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No. _____

In The

Supreme Court of the United States

LIDAS, INC., a Delaware corporation, DAVID CHELALA: LILIANE CHELALA,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can a treaty providing for an exchange of tax information between the United States and a foreign government expand the summons power expressly granted by Congress to the IRS under Title 26, § 7602, thereby enabling the IRS to use that power to obtain bank records, not for use in connection with any domestic tax liability, but rather solely in order to provide them to the foreign government for use in connection with an alleged foreign tax liability?

2. In the absence of any implementing legislation enacted by Congress, does a treaty having such effect exceed the treaty power under Article II, § 2, cl.2 and encroach upon exclusive Congressional power under Article I of the United States Constitution?

3. Even if the IRS has the power to issue such a summons, can it meet its burden under this Court's decisions in *Powell** and *Stuart*** of establishing a prima facie showing of good faith for summary enforcement of the summons, by submitting declarations of IRS representatives that merely parrot the boilerplate *Powell/Stuart* requirements without stating any supporting facts, even though key assertions regarding the foreign tax investigation plainly may not be within the personal knowledge of the declarant as is required by FRCP 56 (e) and the Federal Rules of Evidence?

**United States v. Powell*, 379 U.S. 48, 85 S.Ct. 248, 13 L.Ed.2d 112 (1964)

***United States v. Stuart*, 489 U.S. 353, 109 S.Ct. 1183, 103 L.Ed.2d 388 (1989)

LIST OF PARTIES AND RULE 29.6 LIST

The caption of this case contains all of the names of the parties to the proceedings in the District Court and Court of Appeals.

Petitioner Lidas, Inc., is a subsidiary of Lidas Realty Investments, Ltd., the stock of which is owned by petitioners David and Liliane Chelala. No publicly held company owns 10% or more of either Lidas, Inc. or Lidas Realty Investments, Ltd.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Lidas, Inc., David Chelala and Liliane Chelala, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit filed on February 5, 2001.

OPINION BELOW

The opinion of the Court of Appeals was officially reported as *Lidas Inc. v. United States*, 238 F.3d 1076 (9th Cir. 2001). It is reprinted in the Appendix at A-1.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on February 5, 2001. There was no petition for rehearing. This Court has jurisdiction to review the judgment by virtue of Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATY AND STATUTES

The constitutional provisions, treaty and federal statutes involved in this case are voluminous. Accordingly, as is permitted by Rule 14.1(f), they are merely cited and described briefly here and set out verbatim in the appendix.

The following provisions of the United States Constitution are involved:

Article I, § 1, requiring all legislative powers to be vested in a Congress consisting of a Senate and a House of Representatives. (Appendix, A-50.)

Article I, § 7, cl.1, sometimes referred to as the "origination clause," which provides in pertinent part: "All Bills for raising Revenue shall originate in the House of Representatives. . . . " (Appendix, A-50.)

Article I, § 7, cl.2, sometimes referred to as the "presentment clause," requiring legislation to be passed by both houses of Congress and presented to the President for signature. (Appendix, A-50.)

Article I, § 8, cl.1, which provides in pertinent part: "The Congress shall have the Power to lay and collect Taxes. . . . " (Appendix, A-51.)

Article II, § 2, cl.2, which provides that the President, with the advice and consent of two thirds of the Senate, shall have the power to make treaties. (Appendix, A-51.)

The "Treaty" involved is the "Convention Between the Government of the United States of America and the Government of the French Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital," signed by the treaty partners August 31, 1994 and ratified by the Senate August 11, 1995. (Appendix, A-59.)

The following provisions of the Internal Revenue Code ("IRC"), Title 26, U.S.C., are involved:

Sections 7602(a) and (a)(2), which provide the Internal Revenue Service ("IRS") with authority to issue summonses to obtain books, papers, records or other data, for the purposes related to "any internal revenue tax." (Appendix, A-58.)

Section 6103(a), which provides that "returns" and "return information" shall be confidential and shall not be disclosed by any officer or employee of the United States, except as provided in the IRC. (Appendix, A-55.)

Sections 6103(b)(1) and (2), which define the terms "return" and "return information" as used in that section. (Appendix, A-56.)

Section 6103(k)(4), which is one of several expressly permitted disclosures of "certain returns and return information for tax administration purposes." It permits the disclosure of a "return or return information" to "a competent authority of a foreign government" which has

a tax convention with the United States, to the extent such disclosure is provided for in such convention. (Appendix, A-57.)

This case also involves the following provisions of the Right to Financial Privacy Act ("RFPA"), Title 12 U.S.C. § 3401 *et seq.*:

Section 3402, which provides that "no Government authority may have access to or obtain" financial records of any customer of a financial institution, with certain exceptions. (Appendix, A-54.)

Section 3413(c), one of the exceptions, which permits "disclosure of financial records in accordance with procedures authorized by Title 26." (Appendix, A-55.)

STATEMENT OF THE CASE

A. Basis for Federal Jurisdiction Over Action.

This action was commenced in the United States District Court by petitioners to quash an IRS summons. The defendant, United States of America ("the Government"), moved to dismiss the complaint and to enforce the summons. The District Court had jurisdiction pursuant to Title 26 U.S.C. §§ 7604 and 7609(b)(2). On February 8, 1999, the District Court granted the Government summary judgment, but stayed enforcement of the summons pending an appeal by petitioners. (Opinion, p. 1079.)[1] The Ninth Circuit Court of Appeals, which had jurisdiction to hear petitioners' timely appeal under 28 U.S.C. § 1291, affirmed the judgment of the District Court.

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[1] The citation "Opinion" herein refers to the opinion of the Court of Appeals, beginning at 238 F.3d 1076.

B. Facts Material to Questions Presented.

1. The Issuance of the Summons Pursuant to France's Request Under the Treaty.

On May 14, 1998, the IRS served a summons on Mitsui Manufacturers Bank seeking bank records of accounts held or controlled by petitioners for a French tax investigation of the individual petitioners, David and Liliane Chelala. (Opinion, p. 1079; Findings ¶ 2 a, b, Supp. E.R. 8.)[2] The Chelalas were non resident aliens who resided in the Republic of Congo. (Findings ¶ 2 d, Supp. E.R. 9.) The summons was served in response to a formal request by the French tax authorities under the Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, between the United States and France, herein referred to as "the Treaty." (Opinion, p. 1079; E.R. 154, 486-487.)[3] It is undisputed that the subject bank records were not sought by the IRS in connection with any alleged U.S. tax liability of any of the Petitioners.

The Treaty was signed by the United States and France on August 31, 1994 and later ratified by the U.S. Senate. (Supp. E.R. 49.) It is undisputed that it was not adopted by ***both*** houses of Congress, nor was any enabling legislation ever enacted by Congress to implement any of its provisions. The stated objectives of the

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[2] As used herein, "Findings" and "Conclusions" will refer to the District Court's Findings of Fact and Conclusions of Law; filed February 5, 1999 (Supp. E.R. 6-34); "E.R." refers to appellants' excerpts of record in the Court of Appeals; "Supp. E.R." refers to appellee's supplemental excerpts of record.

[3] On its face, the summons recited that it was "pursuant to a request under Article 26 of the United States French Tax Convention." (E.R.; Findings, ¶ 2 b, Supp. E.R. 8.) It should have referred to Article 27. (Findings, fn. 4, Supp. E.R. 24.)

Treaty were the avoidance of double taxation and prevention of tax evasion. (Opinion, p. 1079.) Article 2.1 of the Treaty expressly provided that "[t]he taxes which are the subject of this Convention" included "the Federal income taxes imposed by the Internal Revenue Code. . . . " To carry out its stated objectiyes, the Treaty made a great many changes to existing U.S. tax rates, deductions and exemptions and tax procedures under the IRC, and even created new tax concepts.[4] Moreover, Article 2.2 provided that "[t]he Convention shall apply also to any identical or substantially similar taxes that are imposed after the date of signature of the Convention in addition to, or in place of, the existing taxes."

Article 27 of the Treaty, entitled "Exchange of Information," began with this statement:

> "The competent authorities of the Contracting States shall exchange such information as is pertinent for carrying out the provisions of this Convention and of the domestic laws of the Contracting States ***concerning taxes covered by this Convention*** insofar as the taxation thereunder is not contrary to this Convention." (Emphasis added.) (Treaty, Article 27, ¶ 1.)

Article 27 also provided that in no case should the provisions of paragraph 1 be construed as imposing on a

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[4] Numerous examples of these alterations of U.S. tax law were detailed in Petitioners' opening brief to the Court of Appeals, at pp. 12 to 16. The Government did not deny that the Treaty had this effect. Instead, the Government simply argued that it would have been "totally impracticable," or at least "very difficult," for these desired changes to have been enacted as normal tax legislation, originating in the House of Representatives and passing both houses of Congress. (Appellee's Brief, Court of Appeals, pp. 5, 22-23.)

Contracting State the obligation, (a) "to carry out administrative measures at variance with the laws of the administrative practice of that or the other Contracting State" (Art. 27, 2(a)); or (b) "to supply particulars that are not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State." (Art. 27, ¶ 2(b).) Paragraph 4(a) of Article 27 then provided:

> "If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall obtain the information to which the request relates in the same manner and to the same extent as if its own taxation were involved, ***notwithstanding the fact that the other State may not, at that time, need such information for purposes of its own tax.***" (Emphasis added.)

2. The Proceedings in the District Court.

On June 3, 1998, the petitioners filed a complaint under 26 U.S.C. § 7609(b)(2) to quash the summons, arguing, *inter alia*, that the Treaty was unconstitutionally void and that the issuance of the summons was improper under the Internal Revenue Code. (Opinion, p. 1079; E.R. 263-287.) The Government answered the complaint and filed a motion to dismiss the complaint and to summarily enforce the summons. (E.R. 86-128.) By order of the District Court, the Government's motion later was converted into a motion for summary judgment under FRCP Rule 56. (E.R. 947-981.)

To establish its prima facie case of good faith in the issuance of the summons under *Powell v. McCormack*, 395 U.S. 486 (1969) the Government submitted a declaration by IRS Assistant Commissioner (International) John T. Lyons. Lyons declared that he was authorized to act for the purpose of administering all exchange of information programs of tax treaties, and that he had reviewed the French

request for information about the Chelalas and had determined it to be proper under the Treaty. He then purported to declare that ***the requested information, (1) was not in the possession of the French tax authorities, (2) may be relevant to a determination of the Chelalas' French income tax liability, and (3) is the same type of information that could be obtained under French law.*** (E.R. 153-160; Opinion, p. 1082; Conclusions, ¶ 26, Supp. E.R. 23.)

Petitioners then moved for summary judgment on their action to quash. (E.R. 49-80.) They argued, *inter alia*, that because the Treaty altered U.S. tax laws and affected revenue, it could not lawfully be enacted as a self executing treaty under Article II, § 2, cl.2 of the Constitution, because its provisions necessarily infringed upon exclusive Congressional power under Article I of the Constitution. (Conclusions ¶¶ 9-13, Supp. E.R. 13-17.) Petitioners further contended that the summons had been issued for an improper purpose because it was not authorized by the IRC and the RFPA precluded access to their bank records under the circumstances of this case. (Conclusions ¶ 28, Supp. E.R. 24-25.) Petitioners also filed written evidentiary objections to Lyons' declaration, as well as other declarations submitted by the Government, on the ground that they did not comply with the requirement of Rule 56(e) of the Federal Rules of Civil Procedure ("FRCP"), or the Federal Rules of Evidence, in that they obviously were not made on ***personal knowledge***, did not set forth ***facts as would be admissible in evidence***, and did not ***show affirmatively that the declarant was competent to testify to the matters stated therein.*** (E.R. 319-321; Conclusions ¶ 27, Supp. E.R. 24.)

The District Court entered a final order on February 8, 1999, denying petitioners' motion for summary judgment. The order further granted summary judgment to the Government, thereby dismissing petitioners' action to quash and summarily enforcing the summons. (Supp. E.R. 1-3.) Separate Findings of Fact and Conclusions of

law also were entered. (Supp. E.R. 6-34.) The District Court concluded, *inter alia*, that an income tax treaty like the one involved in this case is not a "Bill for Raising Revenue" within the meaning of Article I, § 7, cl.1 of the Constitution, and hence it does not require Congressional approval even though it may involve the exercise of other powers granted to Congress under Article I, such as the power to tax under Article I, § 8, cl.1. Rather, the District Court concluded that the enumerated powers of Congress under Article I, § 8 are non exclusive and do not preclude the valid enactment of income tax treaties by the President and Senate alone under the Treaty power. (Conclusions ¶¶ 12-14, Supp. E.R. 15-17.)

The District Court further concluded that the summons was properly issued under § 7602 of the IRC, and disclosure of petitioners' bank records to the IRS and French tax authority would not violate the RFPA, because:

(1) Title 12 U.S.C. § 3413(c) of the RFPA exempts IRS summonses issued under the IRC; and (2) IRC § 6103(k)(4) permits disclosure of "return information" to tax treaty partners. (Conclusions ¶¶ 20, 28-3, Supp. E.R. 20, 24-27.)

The District Court also overruled petitioners' objections to the Government's declarations, holding that Lyons' declaration alone was sufficient to satisfy the Government's minimal requirement of showing good faith under *Powell* and *United States v. Stuart*, 489 U.S. 353, 103 L.Ed.2d 388, 109 S.Ct. 1183 (1989), and therefore summary enforcement of the summons was proper. (Conclusions 21-27, Supp. E.R. 20-24.) Regarding petitioners' objections under FRCP 56(e), the Court concluded Lyons had sufficient personal knowledge by virtue of his position as the person who administered exchange of information programs under tax treaties, stating that the FRCP "may be applied more limitedly when their strict application would impair a summary proceeding to demonstrate the United States' good faith to warrant enforcement of a summons." (Conclusions ¶¶ 26-27, Supp. E.R. 23-24.)

3. The Court of Appeals' Decision.

In the Court of Appeals, petitioners argued again that the summons was improperly issued, in that, (a) it was not authorized by the IRC or RFPA; (b) a treaty enacted only by the President and Senate could not constitutionally alter existing U.S. tax laws; and (c) hence, at best, the Treaty at issue was merely executory and of no legal effect without the adoption of implementing legislation by Congress in strict accordance with Article I procedures. (Opinion, pp. 1079, 1081, 1082-1084.) Petitioners also continued to press their argument that, in any event, summary judgment in favor of the Government enforcing the summons, based on Lyons' declaration, was improper. (Opinion, pp. 1081-1082.)

The Ninth Circuit Court of Appeals held that petitioners did not have standing to raise their constitutional arguments. (Opinion, pp. 1079-1081.) But the Court actually backed into that conclusion using this reasoning:

> "The Chelalas meet the first two standing requirements. They have suffered an injury in fact – the IRS has summoned their bank records – and this injury is traceable to the Treaty whose constitutional validity they are challenging. However, the Chelalas' challenge to the Treaty founders on the redressability prong of the standing analysis. Even if we were to hold that the Treaty's double taxation provisions are non-self-executing because they infringe on Congress's exclusive powers, the Chelalas' injury would still not be redressed. ***As we explain below, the Treaty's exchange of information provisions, the sole cause of the Chelalas' injury, are severable from the double taxation provisions and are otherwise well within the scope of the treaty power.*** Hence, they are self-executing and can be validly applied against the Chelalas

now, even if other provisions in the Treaty could not." (Emphasis added.) (Opinion, p. 1080.)

Thus, in order to hold that petitioners had no standing to make their constitutional arguments, ***the Court expressly did decide that the provisions of Article 27 of the Treaty were themselves constitutional.*** On that point, the Court's later explanation was as follows:

> "The Chelalas have not argued that the Treaty's exchange of information provisions, standing alone, would encroach upon exclusive Congressional power or otherwise exceed the scope of the treaty power. ***Such an argument would surely fail in any event, since nothing in the Constitution grants Congress the exclusive power to authorize the exchange of lawfully collected financial information with foreign states.*** Thus, even if the double taxation provisions do exceed the treaty power and hence require implementing legislation, the exchange of information provisions are severable and self-executing." (Emphasis added.) (Opinion, p. 1081.)[5]

With respect to the statutory arguments, the Court of Appeals rejected petitioners' contention that the IRC does not authorize summonses by the IRS for foreign tax investigations by foreign tax authorities, holding as follows:

> "The Chelalas next contend that the IRS may only issue summonses for investigation of domestic tax liabilities. The summons in question here was issued pursuant to 26 U.S.C.

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[5] As we will demonstrate *infra*, the Court of Appeals wrongly assumed that petitioners do not contend Article 27 of the Treaty, standing alone, encroaches upon exclusive Congressional power. More importantly, the Court most certainly was wrong in deciding that there was no such encroachment.

> § 7602(a), which grants the IRS authority to issue summonses for the purpose of 'determining the liability of any person for any internal revenue tax.' Appellants contend that the summons here was improper because it related to a 'foreign' rather than 'internal' tax liability. This very argument was rejected by the Second Circuit in *United States v. A.L. Burbank & Co., Ltd.*, 525 F.2d 9 (2d Cir. 1975) (holding that IRS can issue summonses under § 7602 to obtain information for treaty partner). We reject it as well." (Opinion, p. 1081.)[6]

Borrowing the reasoning in *Burbank*, the Court went on to explain, in essence: (a) that the Treaty became the law of the land upon its ratification; and (b) by its terms, Article 27 of the Treaty required the IRS "to employ the same procedures to obtain information requested by France pursuant to the Treaty as it would employ in the investigation of a domestic tax liability." (Opinion, p. 1081.) ***In other words, the Court concluded that Article 27 of the Treaty expanded the expressly limited statutory authority of the IRS to issue summonses under IRC § 7602 to include summonses requested by the French pursuant to the Treaty, even though they do not involve any "internal revenue tax" of the United States.***

The Court also rejected petitioners' contention that the summons violated the protection their bank records were afforded under the RFPA. The appellate court pointed to the exception found in 12 U.S.C. § 3413(c),

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[6] The Court's statement in this quote that the summons was issued under IRC § 7602(a) is inconsistent with its own earlier statement that "[t]he IRS summons in dispute here was issued pursuant to article 27." (Opinion, p. 1079.) In any event, as we have shown, the summons itself recited that it was pursuant to the Treaty. (See n. 3, *supra*.) It did not mention IRC § 7602.

allowing the disclosure of financial records "in accordance with procedures authorized by Title 26," and said that exception exempts IRS summonses from the RFPA, provided the IRS follows "appropriate Title 26 procedures." (Opinion, p. 1083.) The Court further held:

> "Under 26 U.S.C. § 6103(k)(4), the IRS may disclose information collected through the issuance of such summonses 'to a competent authority of a foreign government which has an income tax or gift and estate tax convention, or other convention or bilateral agreement relating to the exchange of tax information, with the United States.' Thus, Title 26 authorizes both the collection and disclosure to France of the Chelalas' financial information in the possession of the bank." (Opinion, p. 1083-1084.)

Lastly, the Court rejected petitioners' arguments regarding the admissibility and sufficiency of Lyons' declaration, stating that it was "virtually indistinguishable from the affidavit submitted" in *Stuart*. (Opinion, p. 1082.) The Court did not mention petitioners' reliance on FRCP 56(e) and Federal Rules of Evidence, however, nor the fact that no such objection had been made in *Stuart*.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD DECIDE WHETHER A TREATY CAN CONSTITUTIONALLY EXPAND THE SUMMONS POWER CONGRESS EXPRESSLY GRANTED TO THE IRS.

A. The Need For Review Under Rule 10(c).

The first two questions presented for review in this petition are related and neither has been addressed by this Court previously. As we will show, the relevant provisions of the present statutory scheme adopted by Congress and signed into law by the President in accordance with Article I of the Constitution simply do not provide

for IRS summonses to be issued solely for the purpose of providing a foreign government with information under a tax treaty. Notwithstanding the express limiting language of those statutory provisions, the Court of Appeals in this case concluded that such summonses must be permitted in order to avoid frustrating the purpose of the exchange of information provisions of the Treaty. In other words, the ***Treaty was construed as creating an expansion of the summons authority expressly granted by Congress to the IRS.*** This raises obvious and substantial Constitutional questions of first impression that warrant review under this Court's Rule 10(c).

It should be noted, moreover, that this case has ramifications that go far beyond the particular dispute between the parties, or even this particular Treaty. In its brief to the Court of Appeals, the Government reported that "at the time of the District Court's decision in this case, the United States had income tax Treaties, such as the one at issue here, in force with at least 49 countries." (Appellee's Brief, pp. 16-17.) One would think the Government would want to know whether those treaties are valid, and whether the President and Senate may continue to alter U.S. tax laws under the Treaty power by entering into additional tax treaties of this type.

B. The IRS Lacks Statutory Authority to Issue a Summons For The Sole Purpose of Supplying Information to a Treaty Partner For a Foreign Tax Investigation.

The fact that the existing statutory scheme does not permit IRS summonses to be used to obtain information solely for a foreign tax investigation cannot reasonably be disputed. The only statutory authority for IRS summonses is found in IRC § 7602, which provides in relevant part:

§ 7602. Examination of books and witnesses

(a) Authority to summons, etc. – For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized –

* * *

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any person the Secretary may deem proper, to appear before the Secretary . . . and to produce such books, papers, or other data, and to give such testimony, under oath, as may be relevant to such inquiry. . . . "

Thus, the statutory grant of authority to issue an IRS summons is expressly limited by the language of § 7602(a) to purposes related to tax returns provided for in the IRC and the determination of liability for, or the collection of, "any internal revenue tax," and by the language of § 7602(a)(2) to records and testimony "relevant or material to such inquiry." These express limitations on the use of IRS summonses necessarily preclude any summons issued solely to obtain records for delivery to a foreign government for use in a foreign tax investigation – i.e., where no "internal revenue tax" of the United States is involved.

Congress certainly has long been aware of the existence of tax treaties like this one, calling for the exchange of certain tax information. Yet Congress never has seen fit

to amend IRC § 7602 to authorize the IRS to use summonses to obtain information relevant only to a foreign tax investigation. Likewise, IRC § 6103(k)(4) provides further evidence that Congress does not intend for the IRS to have authority to obtain information relevant only to a foreign tax investigation. Section 6103(a) provides that "returns and return information" shall be confidential and may not be disclosed by any officer or employee of the United States except as is authorized under the IRC. Section 6103(k) lists various permitted disclosures of "certain returns and return information for tax administration purposes." Section 6103(k)(4), cited by both the District Court and Court of Appeals in this case, reads as follows:

> (4) **Disclosure to competent authority under tax convention.** – A return or return information may be disclosed to a competent authority of a foreign government which has an income tax or gift and estate tax convention, or other convention or bilateral agreement relating to the exchange of tax information, with the United States but only to the extent provided in, and subject to the terms and conditions of, such convention or bilateral agreement."

Thus, although Congress expressly authorized the IRS to make disclosures to foreign governments pursuant to treaties like this one, that authority was specifically limited to a "return or return information." Those terms are defined in IRC § 6103(b). The term "return" is defined in (b)(1) to mean "any tax or information return, declaration of estimated tax, or claim for refund" provided for in the IRC, "filed with" the IRS, including any supplements, schedules and attachments. The term "return information" is defined in (b)(2)(A) to include various kinds of information relating to the nature, source or amount of the taxpayer's income and deductions, and the determination of his proper tax liability

> "whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data received by, recorded by, prepared by, furnished to, or collected by the Secretary ***with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax***, penalty, interest, fine, forfeiture, or other imposition, or offense. . . . " (Emphasis added.)

In other words, the "returns or return information" which Congress authorized the IRS to provide to a tax treaty partner is plainly limited to items provided to or collected by the IRS in connection with a U.S. tax return or U.S. investigative status. These definitions clearly do not encompass bank records or other information that is not already in the IRS' possession, and is not needed in connection with any U.S. tax return or U.S. investigative status, but rather is being sought by a summons solely because it was requested under a tax treaty for a foreign tax investigation. Although the Court of Appeals purported to hold otherwise, it conveniently omitted the fact that § 6103(k)(4) is expressly limited to a "return or return information." (Opinion, p. 1083.) Also see *Stockwitz v. U.S.*, 831 F.2d 893, 894 (9th Cir. 1987); *Ryan v. U.S.*, 74 F.3d 1161, 1162-63 (11th Cir. 1996) [The definition is limited to material filed on or behalf of a particular taxpayer such as Forms 1099 to report dividends and interests and does not include material obtained by discovery or a search warrant].

Likewise, the Court of Appeals misconstrued the RFPA as it applies to the facts in this case. Under the RFPA, bank records receive special protection. 12 U.S.C. § 3402 bars any "Government authority" from having access to anyone's bank records, except as is expressly permitted elsewhere in the Act. It is true that 12 U.S.C.

§ 3413(c) specifically provides: "Nothing in this chapter prohibits the disclosure of financial records in accordance with procedures authorized by Title 26," as the court below pointed out. (Opinion, p. 1083.) It also is true that this means Congress intended to permit the IRS to use its summons power to obtain bank records that otherwise would be prohibited under the RFPA, ***where the summons is properly issued under IRC § 7602.*** But here, as we have shown, § 7602 does ***not*** authorize the use of a summons to obtain any information solely for use in a foreign tax investigation. Hence, Congress could not have intended that summonses like the one issued in this case would be exempted from the RFPA.

The case of *Neece v. IRS of U.S.*, 922 F.2d 573 (10th Cir. 1990) supports petitioners' contention that 12 U.S.C. § 3413(c) does not give the IRS complete exemption from the constraints of the RFPA. There, the Tenth Circuit held that the IRS' authority to examine books and records under IRC § 7602(a)(1) remained "fettered" by the RFPA, and hence the IRS could not lawfully obtain a taxpayer's bank records through a bank's voluntary cooperation. The Court did indicate, by dictum, that a third party summons properly issued under IRC §§ 7602(a)(2) and 7609 for bank records would be covered by the § 3413(c) exemption. But, of course, the Court there was dealing with a ***domestic*** tax investigation, which would expressly be covered by those IRC provisions.[7] Since, as we have shown, a summons to obtain bank records solely for a foreign government's foreign tax investigation is not authorized by §§ 7602 and 7609, the rationale behind the holding in *Neece* should lead to the conclusion that the summons involved here is not exempt under § 3413(c),

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[7] IRC § 7609's third party summons procedures discussed in *Neece* expressly apply to summonses authorized under § 7602(a). (IRC § 7609(c)(1).)

and hence the IRS's access to petitioners' bank records remained fettered by the RFPA. It is undisputed that the Government made no effort to comply with the RFPA in issuing the summons. Nor has the Government claimed that the RFPA even would allow it.

C. The Court of Appeals Holding That The Treaty Overrides The Statutory Limitations on IRS Summonses Under the IRC Misinterprets The Constitution.

The Court of Appeals brushed aside the statutory obstacles to enforcement of the summons discussed above, holding that the IRS was obligated to issue it under Article 27 of the Treaty. In so doing, the Ninth Circuit followed the reasoning of the Second Circuit in *United States v. A.L. Burbank & Co., Ltd.*, 525 F.2d 9 (2d Cir. 1975), *cert. denied*, 426 U.S. 934, 49 L.Ed.2d 386, 96 S.Ct. 2647 (1976), which had reached the same conclusion in a case involving a 1942 tax treaty between the United States and Canada containing provisions similar to Article 27 of the Treaty with France.[8] The Ninth Circuit explained this reasoning as follows:

> "Article 27 – 4(a) of the Treaty provides:
>
> If information is requested by a Contracting State in accordance with this Article, the other Contracting State ***shall obtain the information to which the request relates in the same manner and to the same extent as if its own taxation were involved, notwithstanding the fact that the other State may not, at that time, need such information for purposes of its own tax.***

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[8] The Constitutional arguments made by petitioners in the instant case were not raised in *Burbank*, a pre section 7609 and RFPA case.

> Upon its ratification, the Treaty became part of the law of the United States. See *Bacardi Corp of America v. Domenech*, 311 U.S. 150, 161, 61 S.Ct. 219, 85 L.Ed. 98 (1940). ***The IRS is thereby bound to employ the same procedures to obtain information requested by France pursuant to the Treaty as it would employ in the investigation of a domestic tax liability.*** *See Burbank*, 525 F.2d at 14-15. Although neither party to the Treaty is required, acting on behalf of the other, to exceed its own lawful authority with respect to administrative measures, see art. 27-2(a), or to 'supply particulars' not obtainable under domestic law, see art. 27-2(b), these provisions cannot be interpreted to forbid the IRS from using its summons power to obtain information relating to French tax liabilities. Such an interpretation would nullify the very purpose of article 27. See *Burbank*, 525 F.2d at 13-14." (Emphasis added.) (Opinion, p. 1081.)

Thus, the Court concluded that because the Treaty said the IRS was required to obtain the information for France in the same manner as if a U.S. tax was involved – even though the IRS did not in fact need the information for that purpose – the IRS was bound to obey the Treaty as part of the law of the United States. This result was required, moreover, even though (a) the IRC did not permit the IRS to obtain such information, and (b) the Treaty itself also said the IRS was not required to exceed its authority under U.S. law, nor supply information that was not obtainable under U.S. law. The court said these self-contradictory provisions of the Treaty must be ignored to avoid nullifying the purpose of Article 27. Whether or not that is a proper interpretation of the Treaty, the fact remains that under the court's reasoning, ***it is the Treaty and not IRC § 7602 that supposedly authorizes the IRS to issue summonses to obtain information for foreign tax investigations.***

This holding mandates consideration of the first two questions presented herein, which really are two parts of the same ultimate constitutional question: Can the President and Senate constitutionally use the Treaty power conferred on them by Article II, § 2, cl.2 to expand the IRS' summons power beyond the limited statutory power granted to the IRS in IRC § 7602 by the full Congress and the President under Article I? Petitioners contend that in the absence on any implementing legislation to satisfy the requirements of Article I, the answer must be no.

As petitioners argued in the courts below, a Treaty cannot constitutionally alter U.S. tax laws, because to do so would encroach upon Congress' plenary power to tax under Article I, § 8, cl.1. Moreover, because this Treaty actually altered existing U.S. tax rates, exemptions, tax procedures, and tax privacy it necessarily conflicts with Article I, § 7, cl.1, which provides "[a]ll Bills for Raising Revenue shall originate in the House of Representatives. . . . "[9] In support of their position, petitioners cited the only two known cases that have considered the question of whether a tax could be laid or repealed by a treaty. Both cases said that it could not be done because of the "origination" clause. See, *Edwards v. Carter*, 580 F.2d 1055, 1058 (D.C. Cir.), *cert. denied*, 436 U.S. 907, 98 S.Ct. 2240, 56 L.Ed.2d 406 (1978), and *Swearingen v. United States*, 565

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[9] The power to tax is very broad in scope, reaching virtually every "subject." *License Tax Cases*, 5 Wall. 462 (1866); *New York v. U.S.*, 362 U.S. 522, 525 (1946). Indeed, the Ninth Circuit said this about the scope of Article I, § 7, cl.1: "The term 'Bills for raising Revenue' does not refer only to laws ***increasing*** taxes, but instead ***refers in general to all laws relating to taxes.***" (Emphasis added.) *Armstrong v. United States*, 759 F.2d 1378, 1381 (9th Cir. 1985). Clearly, the exercise of the power to tax includes the *subject* of gathering information for tax purposes, and then disclose it worldwide.

F. Supp. 1019, 1022 (1983); *Hubbard v. Lowe*, 226 F.Supp. 135, 137-138 (S.D.N.Y. 1915) [holding that the Cotton Tax Act was void for violating the Origination Clause].[10]

As we have shown, the District Court disagreed with petitioners' constitutional arguments, concluding (a) that the power to tax under Article I, § 8, cl.1 was not exclusive to Congress and (b) that the Treaty was not a "Revenue Bill" and hence the origination clause was not violated. The Court of Appeals, on the other hand, seemed prepared to concede that petitioners might be correct as to the "double taxation" provisions of the Treaty, but tried to avoid having to decide that issue by holding that Article 27 was severable, valid and self-executing.

The Court of Appeals did not successfully avoid the issue, however, because it held that Article 27 of the Treaty, standing alone, does not "encroach upon exclusive Congressional power or otherwise exceed the treaty power"; and, "nothing in the Constitution grants Congress exclusive power to authorize the exchange of

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[10] It is interesting to note that in *Made In The USA Foundation v. United States*, 56 F.Supp.2d 1266 (N.D.Ala.1999), the Government made essentially the same argument petitioners are making in this case. There, in defending NAFTA and its implementation Act, the Government argued that, taken together, the various opinions of the Justices in *Downes v. Bidwell*, 182 U.S. 244 (1901) "stand for the principle that the Treaty Clause should not be interpreted to curtail Congress' Power under the Foreign Commerce Clause." *USA* at 1300. Footnote 293 of the District Court's opinion quotes from *Downes*:

> "And it certainly cannot be admitted that the power of Congress to lay and collect taxes and duties can be curtailed by an arrangement made with a Foreign nation by the President and two thirds of a quorum of the Senate. See Tucker Const. §§ 354, 355, 356. 182 U.S. at 370."

lawfully collected financial information with foreign states." (Opinion, p. 1081.) The obvious problem with this holding is that it mis-characterizes Article 27 as being nothing more than an agreement for an exchange of "financial information." On its face, it is much more than that. It provides that the Contracting States –

> "shall exchange such information as is pertinent ***for carrying out the provisions of this Convention*** and of the domestic laws of the Contracting States ***concerning taxes covered by this Convention*** insofar as the taxation thereunder is not contrary to this Convention." (Emphasis added.) (Treaty, Article 27, ¶1, Appendix, A-61.)

Thus, Article 27 expressly calls for ***tax information*** to be exchanged as an ***integral part of carrying out the purpose of the entire Treaty*** – a treaty that clearly is an exercise of the power to tax. Moreover, as we have shown, in order to carry out its own purpose, Article 27 itself purports to create what amounts to an exception to IRC § 7602 – which is part of our basic tax code – by authorizing the IRS to obtain requested tax information –

> "in the same manner and to the same extent as if its own taxation were involved, ***notwithstanding the fact that the [IRS] may not, at that time, need such information for purposes of its own tax.***" (Emphasis added.) (Treaty, Article 27, ¶ 4(a), Appendix, A-62.)

Accordingly, even if, as the appellate court held, Article 27 can properly be regarded as "severable" from the rest of the Treaty, which seems dubious, ***that article itself purports to be an exercise of the power to tax.*** The "severable" reclassification conflicts with *INS v. Chadha, infra* at 947-948 [Framers expressly forbid the reclassification of Article I legislation so as to circumvent Article I procedures].

Furthermore, at the very least, it must be recognized that by overriding IRC § 7602 to authorize the use of IRS

summonses to obtain information solely for a foreign tax investigation – including even bank records that otherwise would be protected by the RFPA in such a case – Article 27 of the Treaty has altered federal statutory laws that were enacted by Congress under Article I, § 7, cl.2, the presentment clause. For that reason, the decision by the Court of Appeals is in conflict with this Court's decisions in *Clinton v. City of New York*, 524 U.S. 417, 141 L.Ed.2d 393, 118 S.Ct. 2091 (1998) and *INS v. Chadha*, 462 U.S. 919, 954, 77 L.Ed.2d 317, 103 S.Ct. 2764 (1983.) In *Clinton*, this Court held that the Line Item Veto Act was unconstitutional because it allowed the President alone to amend or repeal statutes (including a tax statute) by future veto, in violation of Article I, § 7, cl.2.

> "In both legal and practical effect, the President has amended two Acts of Congress by repealing a portion of each. '[R]epeal of statutes, no less than enactment, must conform with Article I.' *INS v. Chadha*, 462 US 919, 954, 77 L.Ed.2d 317, 103 S.Ct. 2764 (1983). There is no provision in the Constitution that authorizes the President to enact, amend, or to repeal statutes." *Clinton*, 141 L.Ed.2d at 414.
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> * * *
>
> "If the Line Item Veto were valid, it would authorize the President to create a different law – one whose text was not voted on by either House of Congress or presented to the President for signature." *Clinton*, 141 L.Ed.2d at 420.[11]

In *Chadha*, this Court held that a one house congressional veto provision in § 244(c)(2) of the Immigration and Nationality Act was unconstitutional because it authorized "legislative action" by one House of Congress

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[11] As we have shown, Article 2.2 of the Treaty purports to make the Treaty's provisions applicable to even *future* changes to the IRC. This is akin to a permanent veto of future legislation under the Treaty power.

in violation of the Article I legislative procedures, including Article I, § 7, cl.2.

> "Whether actions taken by either House are, in law and fact, an exercise of legislative power depends not on their form but upon 'whether they contain matter which is properly regarded as legislative in its character and effect.' " S.Rep. No. 1335, 54th Cong., 2d Sess, 8 (1897.)
>
> Examination of the action taken here by one House pursuant to § 244(c)(2) reveals that it was essentially legislative in purpose and effect." *Chadha*, 462 U.S. at 952.

Here, of course, the issue is somewhat different, in that Article II, § 2, cl.2 of the Constitution does give the President, with the advice and consent of two thirds of the Senate, the power to make treaties that then become the law of the land. But does that mean that the President and Senate acting under the treaty power – i.e., without the House of Representatives – may constitutionally repeal or amend a statute that was previously enacted by both Houses of Congress in accordance with Article I? Can they even alter or amend tax laws like IRC § 7602 that were enacted under Article I, § 8, cl.1 and § 7, cl.1? Based on this Court's reasoning in *Clinton* and *Chadha*, we think not. But in any event, those questions are raised by the Ninth Circuit's decision in this case and they should be decided by this Court under Rule 10(c).

Finally, the Government will undoubtedly argue in opposition to this petition, as it did below, that a great many similar income tax conventions have been enacted under the treaty power since World War II, with no apparent objection from the House of Representatives, as if that is evidence of what the framers of the Constitution must have intended. But the fact that both Houses of Congress and several Presidents may have been misinterpreting the Constitution over an extended period of

time does not bind this Court.[12] The ultimate responsibility for interpreting the Constitution rests with this Court, not the President or Congress.

Moreover, in 1885 the House Judiciary Committee Report, which Congress adopted as a published precedent, expressly considered the question of whether the Treaty power alone could be used to enact tax laws without any act of Congress, and concluded that such an exercise of the Treaty power would violate the Constitution. See House Report 2860, 48th Cong., 2d Sess., and Resolution (1885), reported in 2 Hinds, Precedents of the House of Representatives § 1528, pp. 991-993. (See also, p. 991, § 1527, another precedent.) Petitioners submit that this scholarly report and House resolution is very persuasive as to what the framers intended on this issue. In any event, review should be granted so that this long unanswered question can at last be thoroughly briefed by the parties and finally decided by this Court.

II. THIS COURT SHOULD DECIDE WHETHER FRCP 56(e) AND THE FEDERAL RULES OF EVIDENCE REQUIRE ADMISSIBLE, SPECIFIC FACTS AND PERSONAL KNOWLEDGE IN DECLARATIONS OFFERED TO MEET THE IRS' BURDEN UNDER *POWELL* AND *STUART* FOR SUMMARY JUDGMENT ENFORCING AN IRS SUMMONS REQUESTED UNDER A TAX TREATY.

The third question presented for review in this petition necessarily assumes that petitioners have not prevailed on their Constitutional arguments set out

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[12] See *Powell v. McCormack*, 395 U.S. 486, 546-547 (1969). Also see *INS v. Chadha, supra*, at 944-945, where this Court stated that convenience and efficiency do not cure constitutional infirmities, and increasing frequency of potentially unconstitutional conduct sharpens rather than blunts the Court's inquiry.

previously herein. In that event, they contend the Court of Appeals still was wrong to uphold the granting of summary judgment to the Government summarily enforcing the summons at issue, because the declaration of Mr. Lyons did not satisfy the requirements of FRCP 56(e) or the Federal Rules of Evidence governing admissible testimony. Although it is true, as the Ninth Circuit indicated, that Lyons' declaration is very similar to the IRS affidavit that was before this Court in *United States v. Stuart*, 489 U.S. 353, 103 L.Ed.2d 388, 109 S.Ct. 1183 (1989), there is no indication that any objection had been made in that case regarding the declarant's lack of sufficient personal knowledge to satisfy the requirements of FRCP 56(e) and rules of evidence. It was not part of the sole issue excepted for review. See pp. 355-356. Nor are we aware of any other case in which this Court has addressed the actual evidentiary issues presented here. Since this issue is likely to be presented virtually every time the IRS seeks summary enforcement of a summons to obtain information for a tax treaty partner's foreign tax investigation, it should be resolved by this Court under Rule 10(c).

As the Court of Appeal correctly stated below, in *United States v. Powell*, 379 U.S. 48, 57-58, 13 L.Ed.2d 112, 85 S.Ct. 248 (1964), this Court held that in order to establish good faith for the issuance of a summons in a domestic tax investigation, the IRS must "show" that: (1) the investigation will be conducted for a legitimate purpose; (2) the inquiry will be relevant to that purpose; (3) the information sought is not already within the IRS' possession; and (4) the administrative steps required by the IRC have been followed. But this Court did not say *how* the IRS was required to "show" – i.e., ***prove*** – those elements. Certainly, nothing in the opinion seems to have been meant to suggest that the IRS could do so by simply submitting a declaration that recited the required elements as bare conclusions, without including any specific

supporting facts. This is inadmissible. See *United States v. Jungles*, 903 F.2d 468, 477 (7th Cir. 1990); *Burbank v. Washington Metro Area Transit Auth.*, 112 F.3d 1207, 1212-1213 (D.C. Cir. 1997). Testimonial facts are required. See *Holifield v. U.S.*, 909 F.2d 201, 204 (7th Cir. 1990). For a case demonstrating the detailed evidentiary required factual showing see *2121 Arlington Heights Corp. v. IRS*, 109 F.3d 1221 (7th Cir. 1997).

The Court below also correctly stated that in *Stuart*, this Court said the same test applied where the summons was issued at the request of Canada pursuant to a tax treaty. In discussing what constituted "good faith" in that situation, this Court held that IRC § 7602(c) did not apply to such cases, and hence the IRS was not required to show that the Canadian tax investigation had not reached a stage analogous to a Justice Department referral for criminal prosecution.[13] Accordingly, this Court said the IRS affidavit before the Court in *Stuart* satisfied the *Powell* good faith requirements even though it did not show that there was no criminal investigation in Canada.

But the affidavit thus "approved" by this Court in *Stuart* did include (as did Lyons' declaration in the instant case) the following purported recitals: (1) that the information sought was not in the possession of the IRS ***or the requesting foreign government***; (2) that such information might be relevant to a determination of the taxpayers' ***foreign tax liability***; and (3) that such information was the ***same type of information that could be obtained by the Foreign government under its own law.*** These recitals reflect modifications which this Court

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[13] It should be noted that the issues raised in the instant case regarding the lack of any authority for such a summons under the plain language of § 7602(a), and the resulting Constitutional questions, and the summary evidence issues were not accepted for review or addressed in *Stuart*. See 355-356.

obviously felt must be made to the *Powell* elements because the information being sought by the summons was for a foreign tax investigation being conducted by the requesting foreign government, rather than for a domestic tax investigation by the IRS itself. Again, however, what this Court did not say – and presumably did not consider – is how (or even whether) those modified elements must be established consistent with the Federal Rules of Evidence and FRCP 56(e), because no such issues had been raised. As in the instant case, the recitals "under oath" in *Stuart* were simply parroted the modified *Powell* elements as bare conclusions, without stating any specific supporting facts. In particular, no facts were given to show how the IRS official who gave the affidavit had "personal knowledge" as to what information the Canadian government did or did not already possess, how he personally knew the requested information might be relevant to the alleged Canadian tax liability of the taxpayers, or how he knew what type of information could be obtained by Canada under its own law.[14]

It should be beyond reasonable dispute that such a *pro forma* recitation of the boilerplate *Powell/Stuart* elements cannot satisfy the requirements of FRCP 56(e) and the Federal Rules of Evidence. Indeed, FRCP 56(e) unequivocally requires that any affidavit or declaration given in support of a motion for summary judgment "shall be made on personal knowledge," and it must set

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[14] In contrast, see *United States v. Manufacturers and Traders Trust Co.*, 703 F.2d 47 (2d Cir. 1983), approved by this Court in *Stuart*, wherein the IRS submitted declarations or affidavits from a ***Canadian tax agent*** on the issue of "good faith" for the issuance of a summons requested under the same U.S.-Canada Tax Treaty, these were evidence objections, and the District Court had even held an ***evidentiary hearing*** on the issue. Petitioners submit that that is what should have been required in this case.

forth "such facts as would be admissible in evidence" and "show affirmatively that the affiant is competent to testify as to the matters stated therein." While it might not be unreasonable to presume that the appropriate IRS official (such as the auditing civil agent or criminal investigation special agent) will have sufficient personal knowledge to satisfy both the *Powell* requirements and evidentiary requirements of FRCP 56(e) in a domestic tax investigation, that same presumption is not warranted when a foreign government has requested a summons from the IRS for a foreign tax investigation. In such cases, the *Powell* requirements must be modified to fit the very different circumstances presented by the foreign tax investigation, as the IRS attempted to do in both *Stuart* and the instant case. The problem is that the modified requirements plainly require personal knowledge that the IRS is not likely to possess except through hearsay.[15] Hence, in the absence of any recitation of specific facts to show ***how*** the IRS affiant or declarant does have such personal knowledge in a given case, the mandatory requirements of FRCP 56(e) simply cannot be satisfied.

The simple solution, of course, would be to provide an ***affidavit or declaration from an official of the foreign government*** to swear to the necessary facts that are ***within his or her knowledge*** in compliance with FRCP 56(e), as apparently was done in the *Manufacturers and Traders* case cited in footnote 14, *supra*. But that was not done here, and this case and *Stuart* illustrate that the IRS does not believe it always needs to comply with FRCP 56(e) and normal rules of evidence in such cases.

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[15] In the instant case, for example, Lyons apparently based his recitation of the *Powell/Stuart* elements on nothing more than his review of the request from France under the Treaty, which was never disclosed or offered into evidence and which was hearsay. (Conclusions ¶26, Supp. E.R. 23.) *IP v. U.S.*, 205 F.3d 1168, 1176-1177 (9th Cir. 1999) [ruling *Powell* declaration inadmissible hearsay speculation].

Accordingly, this Court should decide, for the benefit of the federal courts, the Government and taxpayers, how the requirements of FRCP 56(e), *Powell* and *Stuart* should be dealt in cases where summary enforcement is sought with respect to a summons requested under a tax treaty.[16]

CONCLUSION

For the foregoing reasons, petitioners pray that their petition be granted to resolve these important federal questions that will continue to be presented every time an IRS summons is requested by a foreign tax authority under one of the many existing tax treaties between the United States and foreign states.

Respectfully submitted,

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Attorneys for Petitioners

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[16] As part of this inquiry, this Court also should review the correctness of the Ninth Circuit's position that while declarations like that of Mr. Lyons are sufficient to satisfy the IRS' "prima facie case" under *Powell*, "the taxpayer bears a 'heavy burden' to rebut the presumption of good faith." (Opinion, p. 1082.) If that means, as it apparently did here, that the IRS can satisfy its burden without showing personal knowledge and specific facts as opposed to bare conclusions, or without complying with the rules including the evidence rules which are Acts of Congress, but the taxpayer is held to a higher standard of proof, including fully complying how can that one sided view of the law possibly be reconciled with FRCP 56(e) and 56(f)? The courts lack the power to suspend the Due Process Federal Rules or the Evidence Rules enacted by Congress. The government cannot fail in its burden to "show" and cleverly shift the burden to the citizen in summary proceedings. See *Watts v. U.S.*, 703 F.2d 346, 347 (9th Cir. 1983).

LIDAS, INC., a Delaware corporation; David Chelala; Liliane Chelala, Plaintiffs-Appellants,

v.

UNITED STATES of America, Defendant-Appellee.

No. 99-55692.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Oct. 4, 2000

Filed Feb. 5, 2001

Edward O.C. Ord, Ord & Norman, San Francisco, California, for the appellants.

Robert E. Lindsay, Tax Division, U.S. Department of Justice, Washington, D.C., for the Appellee.

Appeal from the United States District Court for the Central District of California; Dickran M. Tevrizian, District Judge, Presiding. D.C. No. CV-98-04503-DT-RCX.

Before: O'SCANNLAIN, FERNANDEZ and RAWLINSON, Circuit Judges.

O'SCANNLAIN, Circuit Judge:

We must decide whether an Internal Revenue Service summons issued at the request of French tax authorities under the terms of the United States-France Income Tax Treaty may be enforced in federal court.

I

Appellants Lidas, Inc. ("Lidas") and David and Liliane Chelala (the "Chelalas") appeal the district court's

dismissal on summary judgment of their complaint to quash, and its order summarily enforcing, an Internal Revenue Service ("IRS") summons issued at the request of French tax authorities pursuant to Article 27 of the Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, Aug. 31, 1994, U.S.-Fr., S. Treaty Doc. No. 103-32 (the "Treaty"). Article 27 provides for the exchange of information between the tax authorities of the two nations. The Chelalas are citizens of France who permanently reside in the Congo and are the sole ultimate shareholders of Lidas.

On May 14, 1998, the IRS served a summons on Mitsui Manufacturers Bank for bank records relating to a French tax investigation of the Chelalas. On the same day, the IRS served notice of the summons on the Chelalas by sending them a copy by registered mail to an address in Nice, France provided to the IRS by French authorities. The IRS also sent the Chelalas a copy of the summons to an address in Lebanon that Thomas J. Rossitto, a long-time tax representative for Lidas, provided to the IRS on a Form 2848 (Power of Attorney) signed by the Chelalas themselves. In addition, the IRS sent copies of the summons to Lidas in Los Angeles and to Rossitto himself. Although the IRS was apparently notified a number of times that the Congo was the Chelalas' "tax home," it was not provided a specific Congo address for the Chelalas until June 15, 1998, the day the Bank was to appear before the IRS. As a result, the IRS never mailed a copy of the summons to the Chelalas' Congo address.

On June 3, 1998, the Chelalas filed a complaint under 26 U.S.C. § 7609(b)(2) to quash the summons, arguing,

inter alia, that the Treaty was constitutionally void; that issuance of the summons violated various provisions of the Internal Revenue Code; that summary enforcement of the summons was improper; and that they did not receive notice of the summons in the manner required by 26 U.S.C. § 7609, the due process clause of the Fifth Amendment, or the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 ("Hague Service Convention"). The United States moved to dismiss the complaint and to enforce the summons. On February 8, 1999, the District Court granted the United States summary judgment but stayed enforcement of the summons pending this appeal.

II

The United States-France Income Tax treaty was signed by the President in 1994 and ratified by the Senate in 1995 pursuant to the treaty clause, art. II, § 2, cl. 2 of the Constitution. As its formal title illustrates, the Treaty's objectives are two-fold: the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital. Articles 1-26 and 29-34 of the Treaty relate to the first purpose, avoidance of double taxation, and contain provisions reducing or eliminating the tax liabilities of certain individuals who are domiciled in one of the contracting nations and who derive income from activities in the other. Articles 27 and 28 relate to the second purpose, the prevention of tax evasion, and provide for the exchange of information between the tax authorities of the two nations. The IRS summons in dispute here was issued pursuant to article 27.

According to the Chelalas, because the Treaty contains provisions purporting to alter the Internal Revenue Code – namely, those relating to the avoidance of double taxation – the Treaty as a whole infringes on Congress's power to law [sic] and collect taxes under art. I, § 8, cl. 1 of the Constitution as well as the House's exclusive power to originate all bills for raising revenue under the origination clause of the Constitution, art. I, § 7, cl. 1. As a result, the Treaty exceeds the lawful scope of the treaty power and requires the legislative approval of both houses of Congress before taking effect. In the absence of such implementing legislation, contend the Chelalas, the Treaty is merely executory. They conclude that the summons must be quashed because it was issued pursuant to a treaty which is of no legal effect at the present time.

A

We must first decide whether the Chelalas have standing to raise this challenge. To satisfy the standing requirement of Art. III of the Constitution, the Chelalas must establish that they suffered (1) an "injury in fact" to a legally protected interest that is (2) "fairly traceable to the challenged action of the defendant" and is (3) likely to be redressed by a favorable decision from the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

The Chelalas meet the first two standing requirements. They have suffered an injury in fact – the IRS has summoned their bank records – and this injury is traceable to the Treaty whose constitutional validity they are challenging. However, the Chelalas' challenge to the

Treaty founders on the redressability prong of the standing analysis. Even if we were to hold that the Treaty's double taxation provisions are non-self-executing because they infringe on Congress's exclusive powers, the Chelalas' injury would still not be redressed. As we explain below, the Treaty's exchange of information provisions, the sole cause of the Chelalas' injury, are severable from the double taxation provisions and are otherwise well within the scope of the treaty power. Hence, they are self-executing and can be validly applied against the Chelalas now, even if other provisions in the Treaty could not.

B

The traditional test for severability in statutory cases has been stated as follows: "[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as law." *Board of Natural Resources v. Brown*, 992 F.2d 937, 948 (9th Cir.1993) (quoting *Alaska Airlines v. Brock*, 480 U.S. 678, 684, 107 S.Ct. 1476, 94 L.Ed.2d 661 (1987)). Such an inquiry, the Supreme Court has explained, "is essentially an inquiry into legislative intent." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191, 119 S.Ct. 1187, 1198, 143 L.Ed.2d 270 (1999) (assuming, without deciding, that the severability test for statutes applies to executive orders as well). We are not aware of any federal court that has considered how this test applies to treaties. Given the nature of the Chelalas' challenge to the Treaty, however, we need not

explore here the nuances involved in translating the traditional severability analysis to the treaty context.

The Chelalas do not, and in fact could not, insist that the double taxation provisions of the Treaty are per se unconstitutional. They merely contend that such provisions require implementing legislation because they invade an exclusive power of Congress and that their inclusion in the Treaty renders the entire Treaty non-self-executing. The nature of the Chelalas' constitutional challenge shapes our severability analysis. We must decide whether the Treaty partners would have intended for articles 27 and 28 of the Treaty to be "fully operative" as self-executing provisions even if the remainder of the Treaty was non-self-executing and required implementing legislation before taking effect.

We have no difficulty in answering this question affirmatively. To begin with, it is far from uncommon for a treaty to contain both self-executing and non-self-executing provisions. *See* Restatement (Third) Foreign Relations Law of the United States § 111 cmt. h (1986) ("Some provisions of an international agreement may be self-executing and others non-self-executing."); *see also United States v. Postal*, 589 F.2d 862, 884 n. 35 (5th Cir.1979) ("A treaty need not be wholly self-executory or wholly executory."); *United States v. Noriega*, 808 F.Supp. 791, 797 n. 8 (S.D.Fla.1992) (holding that some provisions of the Geneva Convention Relative to the Treatment of Prisoners of War are self-executing while others are not). Nothing in the Treaty indicates that the parties drafted it as they did with an eye to the precise contours of the subsequent political process which would be required for its various provisions to take effect. Furthermore, the

exchange of information provisions are entirely independent of the double taxation provisions and, in fact, were included in the Treaty to respond to an entirely separate concern, the prevention of tax evasion.

C

The Chelalas have not argued that the Treaty's exchange of information provisions, standing alone, would encroach upon exclusive Congressional power or otherwise exceed the scope of the treaty power. Such an argument would surely fail in any event, since nothing in the Constitution grants Congress the exclusive power to authorize the exchange of lawfully collected financial information with foreign states. Thus, even if the double taxation provisions do exceed the treaty power and hence require implementing legislation, the exchange of information provisions are severable and self-executing. *Cf. Edwards v. Carter*, 580 F.2d 1055, 1081 (D.C.Cir.1978) (MacKinnon, J., dissenting) ("[T]he property disposition portion of the [Panama Canal Treaty] under the Constitution constitutes a severable international agreement that cannot constitutionally come into force unless the entire 'Congress' approves that transfer. . . . Obviously Congress may not be required to approve other parts of the treaty."). A favorable ruling on the Chelalas' constitutional challenge would not redress their injury; therefore, they do not have standing to raise it.

III

The Chelalas next contend that the IRS may only issue summonses for the investigation of domestic tax

liabilities. The summons in question here was issued pursuant to 26 U.S.C. § 7602(a), which grants the IRS authority to issue summonses for the purpose of "determining the liability of any person for any internal revenue tax." Appellants contend that the summons here was improper because it related to a "foreign" rather than "internal" tax liability. This very argument was rejected by the Second Circuit in *United States v. A.L. Burbank & Co., Ltd.*, 525 F.2d 9 (2d Cir.1975) (holding that IRS can issue summons under § 7602 to obtain information for treaty partner). We reject it, as well.

Article 27-4(a) of the Treaty provides:

> If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall obtain the information to which the request relates in the same manner and to the same extent as if its own taxation were involved, notwithstanding the fact that the other State may not, at that time, need such information for purposes of its own tax.

Upon its ratification, the Treaty became part of the law of the United States. *See Bacardi Corp. of America v. Domenech*, 311 U.S. 150, 161, 61 S.Ct. 219, 85 L.Ed. 98 (1940). The IRS is thereby bound by law to employ the same procedures to obtain information requested by France pursuant to the Treaty as it would employ in the investigation of a domestic tax liability. *See Burbank*, 525 F.2d at 14-15. Although neither party to the Treaty is required, acting on behalf of the other, to exceed its own lawful authority with respect to administrative measures, *see* art. 27-2(a), or to "supply particulars" not obtainable under domestic

law, *see* art. 27-2(b), these provisions cannot be interpreted to forbid the IRS from using its summons power to obtain information relating to French tax liabilities. Such an interpretation would nullify the very purpose of article 27.[1] *See Burbank*, 525 F.2d at 13-14.

IV

The Chelalas also contend that the district court erred in granting summary judgment in favor of the United States enforcing the summons. To obtain enforcement of an administrative summons issued pursuant to 26 U.S.C. § 7602(2), the IRS need only demonstrate "good faith" in issuing the summons. The IRS's prima facie showing of good faith is based on the four-part test formulated in *United States v. Powell*, 379 U.S. 48, 85 S.Ct. 248, 13 L.Ed.2d 112 (1964). The IRS must show that: (1) the investigation will be conducted for a legitimate purpose; (2) the inquiry will be relevant to such purpose; (3) the information sought is not already within the Commissioner's possession; and (4) the administrative steps required by the Internal Revenue Code have been followed. *See id.* at 57-58, 85 S.Ct. 248.

The same test applies where the IRS issues a summons at the request of a tax treaty partner. *See United States v. Stuart*, 489 U.S. 353, 109 S.Ct. 1183, 103 L.Ed.2d 388 (1989). In such case, the IRS need not establish the

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[1] The Chelalas' argument that article 27 permits issuance of summonses only for investigations of tax violations that require a showing of specific intent is frivolous on its face. Article 27 contains no such limitation.

good faith of the requesting nation. "So long as the IRS itself acts in good faith [under *Powell*] . . . and complies with applicable statutes, it is entitled to enforcement of its summons." *Id.* at 370, 109 S.Ct. 1183.

Once the IRS establishes a prima facie case for enforcement of its summons under *Powell*, the burden shifts to the taxpayer, who "may challenge the summons on any appropriate ground," including failure to meet the *Powell* requirements. *See Powell*, 379 U.S. at 58, 85 S.Ct. 248. Nevertheless, the taxpayer bears a "heavy burden" to rebut the presumption of good faith. *United States v. Jose*, 131 F.3d 1325, 1328 (9th Cir.1997) (en banc).

A

To establish its prima facie case under *Powell*, the IRS submitted the declaration of IRS Assistant Commissioner (International) John T. Lyons. (ER 153-56.) Lyons declared that (1) he is authorized to act as the "Competent Authority" for the purpose of administering all exchange of information programs of tax treaties; (2) pursuant to the Treaty,[2] the French Government requested information regarding the Chelalas' 1993 and 1994 income tax liability; (3) he reviewed the French request and determined it to be proper under the Treaty; (4) the requested information was not in the possession of the IRS or the French tax authorities; (5) the requested information may be relevant to a determination of the Chelalas' French

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[2] Lyons mistakenly declared that the information was requested pursuant to article 26 of the Treaty rather than article 27. This mistake is of no legal import.

income tax liability; and (6) the requested information is the same type of information that could be obtained under French law.

Courts have consistently recognized that declarations or affidavits by IRS directors or agents generally satisfy the *Powell* requirements. *See, e.g., Stuart,* 489 U.S. at 360-61, 109 S.Ct. 1183; *Barquero v. United States,* 18 F.3d 1311, 1317 (5th Cir.1994). In fact, Lyons's declaration is virtually indistinguishable from the affidavit submitted by the IRS Director of Foreign Operations in *Stuart.* The Court held that such affidavit established the IRS's prima facie case under *Powell. See Stuart,* 489 U.S. at 360-61, 109 S.Ct. 1183. Thus, Lyons's declaration "plainly satisfied the requirements of good faith we set forth in *Powell* and have repeatedly reaffirmed." *Id.* at 360, 109 S.Ct. 1183.

B

The Chelalas attempt to rebut the prima facie case entitling the United States to summary enforcement of the summons by demonstrating the IRS's improper purpose in issuing the summons. They also contest enforcement of the summons on the ground that they did not receive notice as required by 26 U.S.C. § 7609, the Hague Service Convention and their constitutional right to procedural due process. The Chelalas have utterly failed to met [sic] their "heavy burden." *Jose,* 131 F.3d at 1328.

1

The Chelalas contend that the IRS summons sought their financial information for the improper purpose of

disclosing such information to French authorities, which they insist violates the Right to Financial Privacy Act ("RFPA"), 12 U.S.C. § 3401 *et seq.*

RFPA provides that "no Government authority may have access to or obtain copies of, or the information contained in the financial records of any customer from a financial institution . . . " except in limited circumstances and only after the government provides the customer with notice and an opportunity to challenge the disclosure of such information. 12 U.S.C. § 3402. One exception to RFPA is found at 12 U.S.C. § 3413(c): "Nothing in this chapter prohibits the disclosure of financial records in accordance with procedures authorized by Title 26." Consistent with the plain meaning of this language, courts have consistently interpreted RFPA as exempting IRS summonses provided that the IRS followed appropriate Title 26 procedures. *See Barquero v. United States*, 18 F.3d 1311, 1318 (5th Cir.1994); *Neece v. IRS*, 922 F.2d 573, 577 (10th Cir.1990); *United States v. MacKay*, 608 F.2d 830, 834 (10th Cir.1979).

2

The IRS sought the Chelalas' financial information pursuant to its summons authority under 26 U.S.C. § 7602. The procedures the IRS must follow when issuing third-party summonses pursuant to § 7602 are set out in § 7609. Section 7609(a) provides that notice of a third-party summons must be given to any person identified in the description of the records contained in the summons.

Section 7609(a)(2) further provides that the notice is sufficient if it is "mailed by certified or registered mail to the last known address of such person. . . . "

The Chelalas contend that the IRS failed to send notice of the summons to their "last known address" in violation of 26 U.S.C. § 7609(a). Although the IRS was informed on a number of occasions that their tax home was the Congo, the Chelalas lament that the IRS did not send them notice there. This argument is without merit. The IRS did more than enough to comply with § 7609. It sent notice of the summons to the address for the Chelalas appearing on an IRS Form 2848, a form signed by the Chelalas themselves and submitted by the long-time tax representative of Lidas, Thomas Rossitto. *Cf. King v. Commissioner*, 857 F.2d 676, 679 (9th Cir.1988) (holding that the IRS is entitled to rely on the address appearing on a tax form as the "last known address" in the absence of "clear and concise notification from the taxpayer directing the Commissioner to use a different address"). The IRS also sent notice of the summons to the address for the Chelalas provided by French authorities; to Lidas, of which the Chelalas were the sole ultimate shareholders; and to Rossitto himself. There is no indication that the IRS was ever apprised of the Chelalas' actual Congo address until the day the bank was to appear. Notice of the summons was more than sufficient.[3]

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[3] The Chelalas at times fashion their objection to service of the IRS notification as an objection to the district court's subject matter jurisdiction. Presumably, this is because they confuse the discussion of personal jurisdiction in *United States v. Desert Palace, Inc.*, 43 A.F.T.R.2d 79-1128 (D.Nev.1979), in which the court held that the IRS's failure to comply with § 7609 deprived

The IRS complied with § 7609 in issuing the summons. Under 26 U.S.C. § 6103(k)(4), the IRS may disclose information collected through the issuance of such summonses "to a competent authority of a foreign government which has an income tax or gift and estate tax convention, or other convention or bilateral agreement relating to the exchange of tax information, with the United States." Thus, Title 26 authorizes both the collection and disclosure to France of the Chelalas' financial information in the possession of the bank.

3

We similarly reject the Chelalas' final arguments, in which they allege violations of procedural due process and the Hague Service Convention because they purportedly did not get "actual receipt" of notice of the IRS summons. Due process merely requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action." *Mullane v. Central Hanover Bank and Trust*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950). The IRS more than met such standard here.

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the court of personal jurisdiction over the taxpayer, with the discussion of the court's subject matter jurisdiction to entertain suits against the United States to quash an IRS summons developed in cases such as *Ponsford v. United States*, 771 F.2d 1305 (9th Cir.1985). Appellants' suit to quash the summons was timely and thus does not implicate the subject matter jurisdiction issue faced in *Ponsford*. Nor is personal jurisdiction at issue here.

Nor have the Chelalas called our attention to anything in the Hague Service Convention requiring "actual receipt" of such notice. In fact, article 10(a) of the Convention provides that it is not meant to prohibit "the freedom to send judicial documents, by postal channels, directly to persons abroad." Proof of actual receipt is not required. *See Randolph v. Hendry*, 50 F.Supp.2d 572, 578 (S.D.W.Va.1999).[4]

V

For the foregoing reasons, the judgment of the district court is AFFIRMED.

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[4] The Hague Service Convention likewise did not require the notice of the summons to have been translated into French, as the Chelalas contend. While the Central Authority of Convention members may elect to require translation of documents, *see* article 5(b), the Chelalas have not called our attention to any evidence that France has done so here.

¶ 99-490

LIDAS, INC. A Delaware Corporation; David and Liliane Chelala, as Individuals, PLAINTIFFS/PETITIONERS v. UNITED STATES OF AMERICA, DEFENDANT/RESPONDENT. United States District Court, Central Dist. of California, (DC CA) Docket No. CV-98-4503-DT(RCx), Feb. 5, 1999. Decision for Govt.

Alejandro N. Mayorkas, U.S. Atty., Edward M. Robbins, Jr., Asst. U.S. Atty. Chief, Tax Div., Gregory A. Roth, Asst. U.S. Atty., (California Bar No. 102220) Room 2315, Federal Bldg., 300 North Los Angeles St., Los Angeles, Calif., Attorney for the United States of America, Defendant/Respondent.

United States District Court Central District of California Western Division.

Findings of Fact and Conclusions of Law

On January 11, 1999, the "Motion (1) to Dismiss Complaint to Quash Summons (2) for an Order Summarily Enforcing the Summons" filed by the United States of America ("United States"), on behalf of the United States, the Internal Revenue Service ("IRS"), and defendant/respondent United States of America, and the "Motion for Summary Judgment to Quash IRS Summons" filed by plaintiffs/petitioners Lidas, Inc., and David and Liliane Chelala came on for hearing before the Honorable Dickran Tevrizian, Jr., United States District Judge.

Having considered the parties' motions, the other papers and pleadings filed in this case, and the oral arguments of the parties, the Court makes the following findings of fact and conclusion of law:

I. Findings of Fact

A. Factual Summary.

1. This is an action brought by Plaintiffs Lidas, Inc., a Delaware corporation ("Lidas"), and David and Liliane Chelala (the "Chelalas") (collectively, "Plaintiffs") against Defendant United States of America ("United States" or "Defendant") to quash an Internal Revenue Service ("IRS") administrative summons ("Summons"). The Summons was issued on behalf of the French Government, pursuant to an Income Tax Treaty between France and the United States effective on December 30, 1995 (the "Convention"), and seeks Plaintiffs' bankrecords held by Mitsui Manufacturers Bank ("Mitsui").

2. The following facts are undisputed:

a. The Government of the French Republic ("French Government") made a request for information under the Convention.

b. On May 14, 1998, the IRS, through agent Diane Phelps ("Phelps"), issued the Summons on Mitsui in the matter of "the French income tax liability of David and Liliane Chelala" for the period of January 1, 1993 through December 31, 1994, "pursuant to a request under Article 26 of the United States French Income Tax Convention." Declaration of Diane Phelps, Exhibit 1. Mitsui was summoned to appear on June 15, 1998 and give testimony and produce the following "specific documents:"

> All records in your possession, custody, or control relative to any and all accounts including account numbers 84163-1850, 400804-44, and 400631-75 held or controlled by or on behalf of

David or Liliane Chelala, Villa Lolita, 29 Bd de CaMbrai, 06000 Nice, France and account number 400808-44 in the name of Lidas, Inc., 4460 Wilshire, Suite 703, Los Angeles, California, which is owned 100% by Lidas Realty Investments Limited, which has as its shareholders David and Liliane Chelala, each owning 50% for the period January 1, 1993 through December 31, 1994, to include:

1. Signature cards.

2. Bank statements and/or ledger sheets, including account balances as of December 31 of each of the above specified years.

(the "Requested Information"), Decl. of Phelps at Exhibit 1.

c. Copies of the IRS Summons were sent by certified mail or registered mail to the following persons by "IRS SP1850 DPI" on May 14, 1998:

(1) David and Liliane Chelala, Villa Lolita, 29 Bd de Cambrai, 06000 Nice, France;

(2) David and Liliane Chelala, Kernet El-Hamra, Lebanon;

(3) Lidas Inc., 10642 Santa Monica Blvd #208, Los Angeles, CA 90025; and

(4) Thomas Rossitto, 1812 N. 120 St., Omaha, NE 68154-1392. See Decl. of Phelps, Exhibits 6, 7, 10, and 11. Thomas Rossitto is the Chelalas' Power of Attorney. See Decl. of Phelps, Exhibits 8-9. The Chelalas are shareholders of Lidas, Inc. See Decl. of Rossitto, paragraph 4.

d. the Chelalas presently reside in Brazzaville, the Republic of Congo. See Second Declaration of Edward

O.C. Ord, Exhibit 1; Declaration of David Chelala, paragraph 3; Declaration of Thomas Rositto, paragraph 8(e).[1]

B. Procedural History.

3. On June 3, 1998, Plaintiffs filed a Civil Complaint to Quash IRS Administrative Summons Allegedly Issued Under 26 U.S.C. Section 7609 Pursuant to an Alleged Request Under Article 26 of the United States Republic of France Income and Capital Taxes Convention ("Complaint") and a Jury Demand with this Court.

4. On June 17, 1998, Plaintiffs filed an Ex Parte Application for order Barring Summary Disposition of Plaintiffs' Complaint to Quash Summons, which was denied by this Court on June 25, 1998.

5. On October 5, 1998, the United States filed a Motion (1) to Dismiss Complaint to Quash Summons and (2) for an Order Summarily Enforcing the Summons. On November 16, 1998, Plaintiffs filed a Motion for Summary Judgment to Quash IRS Summons. All to these motions are before this Court today.[2]

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[1] The parties vigorously dispute the classification of the Chelalas' Congo location as a "residence," "home," "tax home" or "domicile," however this Court makes no determinant as to the appropriate classification and merely recognizes that the Chelalas currently reside there.

[2] The United States alleges Local Rule violations by Plaintiffs in regards to improper and late filings. However, this Court notes that *both parties* have failed to observe both the Local Rules and this Court's Orders of December 1, 1998 and 18, 1998 setting forth the instant briefing schedule. Specifically, Plaintiffs filed *two* oppositions to the United States' one Motion

6. On January 6, 1999, this Court granted the United States' Ex Parte Application for Leave to File Surreply to Plaintiffs' Motion for Summary Judgment to Quash IRS Summons.

7. Any conclusion of law deemed more appropriately designated as a finding of fact is incorporated here as a finding of fact.

II. Conclusions of Law

A. Standard.

Motion for Summary Judgment.

1. Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment is proper only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56. The moving party has the burden of demonstrating the absence of a

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to dismiss and enforce summons, which exceeded the local rule page limitation of 25 pages pursuant to Local Rule 7.3.10. Plaintiffs also filed a Second Declaration of William K. Norman on December 31, 1998, after the reply cut-off date of December 30, 1998. Finally, the United States, *in addition* to a Surreply [sic] filed pursuant to an Ex Parte Application granted on January 6, 1999, filed *seven* amendments to their various moving papers and evidentiary objections without permission of this Court and after the December 30, 1998 cut-off date. This Court recognizes the intent of the Local Rules to bring closure to the parties' arguments to allow this Court to make a well-reasoned determination, nonetheless this Court, in its discretion, has considered all papers provided by both parties.

genuine issue of fact for trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). If the moving party satisfies the burden, the party opposing the motion must set forth specific facts showing that there remains a genuine issue for trial. See id.; Fed. R. Civ. P. 56(e).

2. A non-moving party who bears the burden of proof at trial to an element essential to its case must make a showing sufficient to establish a genuine dispute of fact with respect to the existence of that element of the case or be subject to summary judgment. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Such an issue of fact is a genuine issue if it reasonably can be resolved in favor of either party. See Anderson, 477 U.S. at 250-51. The non-movant's burden to demonstrate a genuine issue of material fact increases when the factual context renders her claim implausible. See Matsushita Electrical industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Thus, mere disagreement or the bald assertion that a genuine issue of material fact exists, no longer precludes the use of summary judgment. See Harper v. Wallingform, 877 F.2d 728 (9th Cir. 1989); California Architectural Building Products, Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1468 (9th Cir. 1987), denied, 484 U.S. 1006 (1988).

3. On a motion for summary judgment, admissible declarations or affidavits must be based on personal knowledge, must set forth facts that would be admissible evidence at trial, and must show that the declarant or affiant is competent to testify as to the facts at issue. Fed. R. Civ. P. 56(c). Declarations on "information and belief" are inappropriate to demonstrate a genuine issue of fact. Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989).

(2) Motion to Dismiss for Failure to State a Claim.

4. Rule 12(b)(6) of the Federal Rules of Civil Procedure provides that a defendant may seek to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Pursuant to Rule 12(b)(6), the court may only dismiss a plaintiffs complaint if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Russell v. Landrieu, 621 F.2d 1037, 1039 (9th Cir. 1980). The question presented by a motion to dismiss is not whether a plaintiff will prevail in the action, but whether plaintiff is entitled to offer evidence in support of his claim. Cabo Distributing Co., Inc. v. Brady, 821 F.Supp. 601 (N.D. Cal. 1992). Dismissal is proper under Rule 12(b)(6) only where there is a lack of a cognizable legal theory, or an absence of sufficient facts alleged under a cognizable legal theory. Balisteri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1988). In testing the sufficiency of a complaint, the court must assume that all of the plaintiff's allegations are true, and must construe the complaint in a light most favorable to the plaintiff. United States v. City of Redwood City, 640 F.2d 963, 966 (9th Cir. 1981) (citing California Dump Truck Owners Assn. v. Associated General Contractors of America, 562 F.2d 607, 614 (9th Cir. 1977); McKinney v. DeBord, 507 F.2d 501, 503 (9th Cir. 1974)). Therefore, it is only the extraordinary case in which dismissal is proper. Corsican Productions v. Pitchess, 338 F.2d 441, 442 (9th Cir. 1964).

5. A motion to dismiss for failure to state a claim challenges the pleadings. Unless the court decides to convert a Rule 12(b)(6) motion into a motion for summary judgment under Rule 56 and gives adequate notice of such intent, the court cannot consider material outside of the compliant. Fed. R. Civ. P. 12(b); Levine v. Diamanthuset, Inc., 950 F.2d 1478, 1483 (9th Cir. 1991). The court may, however consider exhibits submitted with the complaint and matter that may be judicially noticed pursuant to Federal Rule of Evidence 201. Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n. 19 (9th Cir. 1989); Mack v. South Bay Beer Distributors Inc., 798 F.2d 1279, 1282 (9th Cir. 1986).

6. Generally, orders granting motions to dismiss are without prejudice unless "allegations of other facts consistent with the challenged pleading could not possibly cure the defect." Schreiber Dist. v. Serv-Well Furniture, 806 F.2d 1393, 1401 (9th Cir. 1986).

B. Analysis.

[1] 7. Preliminarily, if a party presents matters outside the pleadings and this evidence is considered by this Court, this Court shall treat such a motion as one for Summary Judgment pursuant to Rule 56 Fed. R. Civ. P. 12(b). Because all parties have acknowledged that the instant Motion to Dismiss by the United States may be treated as a motion for summary judgment, and because the parties have been afforded the opportunity to, and have presented pertinent material to a motion for summary judgment, including declarations, this Court shall

treat the United States' Motion to Dismiss as a Motion for Summary Judgment.

8. In addition, both parties have made numerous evidentiary objections to the Declarations and other evidence offered in relation to these Motions. This Court will address those objections, as needed, in the event that reliance upon portions of the objected-to evidence is necessary.

(1) The Convention is a Valid Treaty, and is Applicable to the Case at Hand.

9. The IRS Summons Request was made pursuant to the United States French Income Tax Convention. Plaintiffs argue that the Convention was improperly enacted and, therefore, only constitutes an executory contract with no legal effect and cannot form the proper basis for the Summons. Plaintiffs contend that the Convention, signed by the Contracting States (the United States and France) on August 31, 1994, only was ratified by the Senate and not by both the House of Representatives and the Senate, rendering it an unenforceable treaty. According to Plaintiffs, the Convention "affects revenue by altering tax rates," constituting an exclusive Congressional power under Article 1 of the U.S. Constitution and prohibiting any Presidential self-executing treaty power. The United States counters that the Convention, like other foreign country tax treaties, is not a bill to raise revenue, and falls within the Presidential self-executing treaty power of Article 2 which only requires ratification by the Senate to become law of the United States. This Court agrees with the United States.

10. Article 2 of the United States Constitution states that "[the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . " U.S. Const. art. II, section 23, cl. 2. Non-exclusive congressional powers fall within this Article 2 self-executing treaty power, and do not require any House involvement. A treaty enacted in accordance with Article 2, section 2 becomes effective without implementing legislation from the House and Senate. See Edwards v. Carter 580 F.2d 1055, 1057 (D.C. Cir. 1978). However, if the treaty governs a power that is exclusively vested in Congress, approval by both the House and the Senate is required. "The mere fact, however, that a congressional power exists does not mean that the power is exclusive so as to preclude the making of a self-executing treaty within the area of that power." Id. at 1057.

11. Only certain Congressional grants of authority are exclusive to Congress. See id. at 1058. One such exclusive power which limits Presidential treaty-making power is revenue raising legislation under Article 1, section 7, cl. 1. The Origination Clause provides that "[a]ll Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills." U.S. Const. art. I, section 7. "The term 'Bills for raising Revenue', does not refer only to laws increasing taxes, but instead refers in general to all laws relating to taxes." Armstrong v. United States, 759 F.2d 1378, 1381 [56 AFTR 2d 85-5022] (9th Cir. 1985)(a revenue related bill may increase or decreases taxes). Nonetheless, "origination clause constraints do not extend to bills that incidentally create revenue if

those bills were enacted for purposes other than revenue raising." See, U.S. v. Munoz-Flores, 863 f.2d 654, 657-58 (9th Cir. 1988), rev'd, 495 U.S. 385 (1990) (special assessment statute was not a revenue raising bill).

12. Plaintiffs first direct this Court to Edwards in support of their proposition that the Convention constitutes revenue legislation, and thus, violates the origination clause because it did not originate in the House of Representatives. This Court disagrees that Edwards stands for this proposition. Edwards holds that the power to dispose of property, under Article 4, is not an exclusive congressional power, and may be the subject of a treaty. Id. at 1058. Edwards does state that, unlike the Article 4 property power, the powers to appropriate money and make revenue raising bills trigger the origination clause and preclude "any method of appropriating money or raising taxes other than through the enactment of laws by the full Congress." Id. at 1059. However, Plaintiffs attempt to erroneously broaden Edwards holding to stand for the proposition that all treaties involving any Article 1 powers, including all tax-related treaties, must originate in the House because ALL Article 1 powers are vested exclusively in Congress. This contention is completely unsubstantiated. Other Article 1 provisions, such as the Article 1, section 8 enumerated powers, do not preclude the availability of self-executing treaties. See id. at 1059. Further, Plaintiffs offer no legal authority for the notion that all tax treaties are, per se, "bills for raising revenue," rendering any treaties, including the Convention, invalid. The cases offered by Plaintiffs to support House origination only distinguish between bills that increase or decrease revenue. See Armstrong, 759 F.2d at

1380-81; Wardell v. U.S., 757 F.2d 203, 205 [55 AFTR 2d 85-1093] (8th Cir. 1985) (House version of bill reduced revenue while Senate version increased revenue). Instead, as the United States points out, more than eighteen other comparable tax treaties currently exist with foreign countries. See United States v. A.L. Burbank & Co., Ltd., 525 F.2d 9, 13 n.2 [36 AFTR 2d 75-6227] (2nd Cir. 1975) (recognizing other tax treaties with exchange of information procedures); United States' Opposition to Plaintiffs' Motion for Summary Judgment, p. 6: n. 2. Many courts have considered, discussed and upheld these forming income tax conventions with the identical purposes as the Convention herein, namely to avoid double taxation and prevent fiscal evasion[3], summarily recognizing that the particular convention was initiated by the President and ratified by the Senate. See generally Xerox Corp. v. United States, 41 F.3d 647, 652 [74 AFTR 2d 94-7097] (Fed. Cir. 1994); United States v. Stuart, 489 U.S 353, 366 [63 AFTR 2d 89-681] (1989); Furstenberg v. Commissioner, 83 T.C. 755 (1984) (acknowledging French Tax Convention); Filler v. Commissioner, 74 T.C. 406 (U.S. Tax Ct. 1980) (accord). This Court has found no authority to support the suggestion that income tax treaties, such as the Convention, rise to the level of a revenue-raising bill triggering the origination clause. Senate ratification is the usual evident procedure.

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[3] The Convention, on its face, states as its purpose: "The Government of the United States of America and the Government of the French Republic, desiring to conclude a new convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes in income and capital" See Decl. of Nick Hall, Exhibit B.

13. Plaintiffs direct this Court to Swearingen v. United States. 565 F.Supp. 1019 [52 AFTR 2d 83-5775] (D. Colo. 1983), to argue that a treaty creating an income tax exemption for U.S. citizens violates the origination clause. As the United States explains, however, Swearingen merely held that an executive agreement could not conflict with the Internal Revenue Code. While the court did opine that "a treaty which created an exemption from the taxation of income of United States citizens, contrary to the provisions of the Internal Revenue Code, would be in contravention of the exclusive constitutional authority of the House of Representatives to originate all bills for raising revenues," it made no such holding. Id, at 1022. Further, this Court is persuaded by the aforementioned decisions of courts of higher authority which recognize that income tax treaties do not require Congressional approval to be valid. In addition, in the case at bar, the Senate did not act alone. Members of the Senate and the House formed a Joint Committee on Taxation to prepare an Explanation of the Convention prior to the Senate ratification. See Appendix to United States' Opposition to Plaintiffs' Motion for Summary Judgment, Exhibit C. This coordination of efforts further differentiates the case at hand from others cited by Plaintiffs.

14. Therefore, this Court concludes that Plaintiffs have not met their burden of demonstrating that the Convention constitutes a revenue raising bill covered by the origination clause, so to render the Convention invalid. Accordingly, Plaintiffs' Motion for Summary Judgment to Quash the IRS Summons on the grounds that the Convention is invalid is unwarranted.

(2) The United States Validly Used its IRS Summons Power to Seek the Chelalas' Bank Records.

15. Plaintiffs next argue that the Summons must be quashed because it seeks bank records for the purpose of civil tax liability which exceeds the provisions of the Convention. This Court disagrees.

16. As stated above, the purposes of the Convention are to prevent "fiscal evasion" and "double taxation." Plaintiffs argue that "fiscal evasion" is understood to refer to a criminal tax offense, or at least an offense that requires a showing of intent. However, as Plaintiffs also acknowledge, when construing a treaty, the terms are to be given their ordinary meaning in context of the treaty, and unless the terms are unclear, "it should rarely be necessary to rely on extrinsic evidence in order to construe a treaty." Xerox Corp. 41 F.3d at 652. Although, extrinsic evidence "is often helpful in understanding the treaty and its purposes, thus providing an enlightened framework for reviewing its terms." Id.

17. Here, the Report of the Senate Foreign Relation Committee on the Convention explained that the purposes behind the Convention were:

> to reduce or eliminate double taxation of income earned by residents of either country from sources within the other country, and to prevent avoidance or evasion of income taxes of the two countries. The proposed treaty is intended to continue to promote close economic cooperation between the two countries and eliminate possible barriers to trade caused by overlapping taxing jurisdictions of the two countries. It is

> also intended to enable the countries to cooperate in preventing the avoidance and evasion of taxes.

See Appendix to United States' Opposition to Plaintiffs' Motion, Exhibit D. In the Joint Committee Explanation of the Convention, these two purposes are furthered by the United States and France's agreement to exchange "tax-related information . . . necessary for carrying out the provisions of the treaty *or* of their domestic tax laws . . . [which] *can* include information to be used in a criminal investigation or prosecution." Id. at Exhibit C, p. 7 (emphasis added). Plaintiffs erroneously assert that the Convention differs from other tax treaties because it *does not* include provisions which generally provide for the exchange of information. As cited above, the Convention clearly does recognize such exchanges, and is clearly *not* limited to exchanges for the purpose of preventing crime or fraud. In addition, the case offered by Plaintiffs, Humble Oil & Refining Co., 488 F.2d 953 [33 AFTR 2d 74-588] (5th Cir. 1974), which purportedly bars the IRS from using a summons to "gather" any information prior to such information's specific use for tax liability, in fact considers the enforceability of a "John Doe" summons. See United States v. Humble Oil & Refining Co., 518 F.2d 747 [36 AFTR 2d 75-5749] (5th Cir. 1975) aff'd on reh'g, 518 F.2d 747 [36 AFTR 2d 75-5749] (5th Cir. 1975). The court struck down the John Doe summons because it did not make reference to its purpose or the factual circumstances underlying its issuance, and any tax liability outcome would have been an incidental result. See Humble Oil, 518 F.2d at 748. Such is not the case here.

18. Accordingly, construing the stated purposes of the Convention in light of the statements of the Joint Committee, this Court concludes that no specific stated purpose of criminal or civil fraud is required in order for the Summons to fall within the scope of the Convention. As such, the IRS' summons request was within the Convention's parameters.

19. Moreover, a treaty, when ratified, is equivalent to United States law. See Dames & More v. Regan, 453 U.S. 654, 686-88 (1981). The Convention obliges the IRS to seek documents from Mitsui as if the IRS was ascertaining the American tax liability of the Chelalas. See Burbank, 525 F.2d 9 [36 AFTR 2d 75-6227] (IRS may use summons power to answer a request for information by a tax treaty partner). Specifically, Article 27, Paragraph 4 of the Convention provides, in part, that:

> (a) If information is requested by a Contracting State in accordance with the Article, the other Contracting State shall obtain the information to which the request relates *in the same manner and to the same extent as if its own taxation were involved,* notwithstanding the fact that the other State may not, at that time, need such information for purposes of its own tax.
>
> (b) If specifically requested by the competent authority of a Contracting State, the competent authority of the other Contracting State shall, if possible, provide information under this Article in the form of depositions of witnesses and authenticated copies of unedited original documents (including books, papers, statements, records, accounts, and writings), *to the same extent such depositions and documents can be obtained under the laws and administrative practices*

> *of that [the] other state* with respect to its own taxes.

Decl. of Nick Hall, Exhibit B (emphasis added). Further, when construing U.S. tax law, the starting point is the words of the statute, taking the words at their ordinary meaning. See Bread Political Action Committee v. Federal Election Commission, 455 U.S. 577, 580 (1982).

20. 26 U.S.C. 7602 et seq. authorize the IRS to issue a summons to compel any person having possession of books of account, papers, or other data to produce such materials when needed by the IRS to determine the tax liability of an individual. 26 U.S.C. section 7602(a). Thus, clear U.S. statutory authority as well as case law cited by the United States, recognizes the use of an IRS Summons to obtain information to determine tax liability. As such, the United States properly used the IRS Summons under these facts.

(3) Summary Enforcement of the IRS Summons is Proper.

21. Plaintiffs seek to quash the IRS Summons on the grounds that the legal requirements to enforce a summons set forth in United States v. Powell, 379 U.S. 48 [14 AFTR 2d 5942] (1964), have not been satisfied. In particular, Plaintiffs question the failure of the IRS to service notice on Plaintiffs in the Congo, as well as the express statement in the Summons that it was issued pursuant to a request under Article 26 of the Convention, and not Article 27. While Plaintiffs arguments are reasonable, this

Court finds that the United States has satisfied the minimal Powell requisites to warrant enforcement of the Summons.

22. In order for an IRS summons to merit court enforcement, a "minimal" showing of good faith by the United States is all that is required. Specifically, the United States must meet the four-part Powell test by showing:

> (1) that the investigation will be conducted pursuant to a legitimate purpose;
>
> (2) that the inquiry may be relevant to the purpose;
>
> (3) that the information sought is not already within the IRS' possession; and
>
> (4) that the administrative steps required by the Code have been followed.

Powell, 379 U.S. at 57-58; Ponsford v. United States, 771 F.2d 1305, 1307 [56 AFTR 2d 85-5888] (9th Cir. 1985). The United States' burden is "slight" because this is a summary proceeding during the investigative stage of the taxpayer, Id., United States v. Jose, 131 F.3d 1325, 1329 [80 AFTR 2d 97-8384] (9th Cir. 1997) ("sole purpose of the enforcement proceeding is to ensure that IRS has issued the summons for proper purpose and in "good faith"). Once this showing has been made, the burden shifts to the contesting taxpayer to challenge the summons on the appropriate grounds. See United States v. Stuart, 489 U.S. 353, 359-60 [63 AFTR 2d 89-681] (1989). Those grounds include that the IRS has failed to meet the Powell requirements, or that enforcement of the Summons would be an abuse of process. Id. An abuse of process would arise

where the summons was issued "for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation." Id. at 360. The taxpayer's burden is a "heavy one," requiring allegations of "specific facts and evidence to support his allegations of bad faith or improper purpose." Jose, 131 F.3d at 1328.

23. Courts have consistently recognized that declarations or affidavits by IRS directors, agents or acting directors typically satisfy the requisite Powell showing. See Stuart, 489 U.S. at 360 (IRS director's affidavit sufficient where it provided that: (1) information was not in possession of U.S. or foreign authorities, (2) information "might be relevant" to computation of taxpayer's foreign tax liability, and (3) "same type of information" could be obtained under foreign law by foreign authorities); United States v. Saunders, 951 F.2d 1065 [69 AFTR 2d 92-331], (9th Cir. 1991) (assertions in affidavit of Revenue officer that Powell requirements were satisfied is sufficient); United States v. Abrahams, 905 F.2d 1276, 1280 [66 AFTR 2d 90-5125] (9th Cir. 1990), rev'd on other grounds, United States v. Jose, 131 F.3d 1325 [80 AFTR 2d 97-8384] (9th Cir. 1997) (declarations by IRS special agent sufficient to show minimal enforcement standard); Barquero v. United States, 18 F.3d 1311 [73 AFTR 2d 94-1769] (5th Cir. 1994) (satisfactory IRS affidavits state (1) information sought was not in possession of U.S. or Mexican authorities, (2) information "might be relevant" to taxpayer's foreign tax liability, (3) same type of information was available under Mexican law, and (4) Mexican tax authorities had requested the information from the IRS); United

States v. Bache Halsey Stuart. Inc., 563 F.Supp. 898, 900 [50 AFTR 2d 82-5932] (S.D.N.Y. 1982) (acting director affidavit valid where it stated that (1) director was the "competent" U.S. authority, (2) the requested information may be relevant, (3) the request was issued pursuant to Netherlands tax investigation, and (4) same type of information can be obtained by Netherlands tax authorities under Netherlands law).

(a) United States Has Made a Minimal Showing of Good Faith.

24. The United States has presented the Declarations of IRS Assistant Commissioner (International) John T. Lyons, IRS Revenue Agent Diana Phelps, IRS Attorney Irene Scott Carroll and IRS Deputy Assistant Commissioner (International) Nick Hall to meet its Powell good faith showing. Plaintiffs argue that these declarations are insufficient because they are comprised of "boilerplate" language, and do not meet the Rule 56(e) requirement that declarations be made upon "personal knowledge," setting forth "such facts as would be admissible in evidence" and showing "that the affiant is competent to testify to the matters stated" therein. Fed. R. Civ. P. 56(e). However, this Court is of the opinion that the Lyons Declaration is admissible and, alone, adequately satisfies the Powell showing.

25. First, Plaintiffs argument that the Lyons Declaration should be stricken for containing mere boilerplate language is without merit. Plaintiffs' only authority for their contention is Weiner v. FBI, 943 F.2d 972 (9th Cir. 1991), wherein FBI affidavits comprised of boilerplate

explanations of why certain documents should be withheld under the Freedom of Information Act, without explanation of the specific documents at issue, did not afford the plaintiffs an opportunity to advocate their release. However, as stated by the Weiner court, "*specificity* is the defining requirement" when reviewing these indexes of withheld documents, known as "Vaughn Indexes." Id. at 979. In camera review by the court was not even a proper substitute for an adequate index of the documents at issue. However, unlike the adversary proceedings under the Freedom of Information Act, the summary proceedings of an IRS summons' enforceability differs. There is no such specificity requirement in summons' cases. In fact, the abundance of precedent referred to above evidences the minimal showing that is needed in a director's declaration. Further, unlike Weiner where an in camera review was insufficient, courts have stated that in camera review, although within this Court's discretion, is not a requirement under Powell. Alphin v. U.S., 809 F.2d 236, 238 [59 AFTR 2d 87-456] (4th Cir. 1986) (the right to an evidentiary hearing is "not absolute," and discovery is only appropriate where the challenging taxpayer "makes a preliminary demonstration of abuse"); United States v. Harris, 628 F.2d 875, 880 [46 AFTR 2d 80-5962] (5th Cir. 1980) (method and scope of discovery in summons enforcement proceedings is within district court's discretion). Plaintiffs point to no authority to the contrary that suggests that this Court *must* conduct an in camera review of the Request for Information provided to the IRS. Also, Plaintiffs' contention that the intentions of the French Government must be considered by this Court is without merit. See Stuart 489 U.S. at 370 (IRS need not

attest to stage of foreign investigation so long as IRS itself acts in good faith). As stated above, the sole requirement is that the United States satisfy the Powell showing through a declaration. Consideration of the foreign government's action is not needed. Therefore, the Plaintiffs' objection to Lyons' declaration as "boilerplate' language is overruled.

26. Here, the Lyons declaration, filed in connection with the United States' Motion to Enforce the Summons, satisfies the Powell criteria. Lyons declares that (1) he is the "Competent Authority" for the purposes of administering the exchange of information under the Convention, (2) the French Government requested information regarding the Chelalas' 1993 and 1994 tax liability, (3) he has reviewed the Request and determined it to be proper under the Convention, (4) the requested information is not within the possession of the IRS or the French tax authorities, (5) the requested information "may be relevant to a determination of [the Chelalas'] correct income tax liability under French law," and (6) the requested information is the same type of information that could be obtained by French tax authorities under French law. See Decl. of Lyons, paragraphs 2-6. This Court concludes that this Declaration is sufficient to satisfy the Powell test[4].

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[4] Plaintiffs object to the Declaration of Nick Hall, the Assistant Commissioner (International) which states that he believes that Lyons' declaration (and the Summons itself) mistakenly referred to Article 26 of the Convention instead of the proper provision, Article 27, as inadmissable for lack of personal knowledge. Plaintiffs also argue that the Summons' itself should be stricken because of the defect in its reference to "Article 26." This Court disagrees. An assistant or acting

27. Plaintiffs' argument that Federal Rules of Civil Procedure Rule 56(e)'s personal knowledge requirement renders Lyons' declaration inadmissible is also unfounded. This Court finds it reasonable that Lyons, as Assistant Commissioner and the Competent Authority of administering "all exchange of information programs under tax treaties" would have personal knowledge of the facts referenced above. Further, courts have recognized that the Federal Rules of Civil Procedure may be applied more limitedly when their strict application would impair a summary proceeding to demonstrate the United States' good faith to warrant enforcement of a summons. See Alphin 809 F.2d at 239 (agent's declaration satisfies Rule 56(e)'s concern that declaration be made on personal knowledge and that declarant be competent to testify to the stated matters).

(b) Plaintiffs' Have Failed to Demonstrate an Improper Purpose.

27. Plaintiffs argue that the issuance of the Summons was improper because United States statutory law

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director's declaration may suffice for purposes of Powell. Here, Hall explains that the present Article 27 (Exchange of Information) of the 1995 Convention merely superceded the same provision which was numbered Article 26 in the previous Convention. This Court concludes that the parties were not prejudiced by this defect, and Plaintiffs' arguments evidence that they were aware that the Summons' authority arose out of Article 27 of the Convention. At this stage of the proceedings, it would exalt form over substance to make the IRS go through the motions of issuing a new summons, serving it, defending a motion to quash, and filing a motion for enforcement, all to bring us back to where we are now.

limits the Convention's application. According to Plaintiffs, the Right to Financial Privacy Act ("RFPA") governs all disclosures by the United States, and prevents any entity, other than the United States Government, from having access to financial records protected under the RFPA. See 12 U.S.C. section 3402. The United States urges that the IRS is empowered under the Convention to use its summons power to obtain information for tax liability investigations pursuant to Title 26 and other U.S. authority, and the RFPA does not apply to IRS summons. This Court agrees with the United States.

29. The RFPA provides that "no Government authority may have access to or obtain copies of, or the information contained in the financial records of any customer from a financial institution" except under closely regulated procedures for "notice to the bank customer and an opportunity for the bank customer to challenge production of the bank records prior to their release to the IRS." 12 U.S.C. section 3402; Neece v. IRS, 922 F.2d 573-74 [67 AFTR 2d 91-400] (10th Cir. 1990). Section 3413(c) provides an exception to RFPA, permitting "disclosure of financial records in accordance with procedures authorized by Title 26." 12 U.S.C. section 3413(c). The rationale behind section 3413(c) is that RFPA protection is unnecessary where other procedures are in place to protect the customer's right to privacy. Neece, 922 F.2d at 575. "Administrative summons issued by the Internal Revenue Service are already subject to privacy safeguards under section 1205 of the Tax Reform Act of 1976" and "are exempted from the procedures of [RFPA]." Id. at 576. As this Court discussed above, where a treaty exists, "American administrative procedures . . . are properly

utilized where the purpose is solely to assist the investigation" of possible foreign tax liability. Burbank, 525 F.2d at 16-17. The United States may "utilize the same investigative techniques that it would employ if that person were under investigation (in the U.S.] for a domestic tax liability." Id. at 13. Thus, this Court rejects Plaintiffs' contention that the section 3413(c) exemption only exempts domestic tax disclosure under IRS summonses, but does not expand to allow foreign governments to utilize the exemption to ascertain foreign tax liability. This notion completely negates the very purpose of the Convention, and Plaintiffs offer no convincing authority which supports such an intent by Congress. The concerns behind the RFPA of obtaining bank records without notice to the taxpayer and an opportunity for some type of judicial review are clearly protected by Title 26, and have been addressed in the instant case as evidenced by the Complaint at issue. See Neece, 922 F.2d at 577 (discussing the Congressional intent of the RFPA). Finally, Plaintiffs' reliance on Neece to contravene this conclusion is unfounded as Neece mandated RFPA compliance where a bank contacted the IRS and voluntarily turned over a bank customer's records. The Neece court concluded that it would be improper for a financial institution to turn over records without being subject to either RFPA or Title 26 procedural requirements. This case is completely distinguishable because the IRS was subject to Title 26 procedural requirements when it issued the Summons on Mitsui Bank. Therefore, unlike Neece, the safeguards contemplated by Congress in the RFPA have been satisfied.

30. Finally, Plaintiffs claim that the RFPA section 3413(c) exempts IRS disclosures from RFPA requirements, but not information "gathered" in an IRS Summons for a foreign government. Plaintiffs' argument exceeds the parameters of the RFPA. The RFPA is "focused specifically on financial institutions" and their disclosures to the IRS. Neece, 922 F.2d at 577. There is no authority for the proposition that RFPA extends to limit the IRS' disclosures to a foreign government. As discussed herein, regarding the Convention, it's well settled that the IRS has the power to "obtain information under American law." Stuart, 489 U.S. at 366. "Even where a provision of a treaty fairly admits two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred." Stuart, 489 U.S. at 367-68; Barquero, 18 F.3d at 1317 (recognizing the section 3413 exception where IRS issued summons pursuant to a request under a Mexican treaty). The IRS may use its summons power to honor treaty requests, and this Court is of the opinion that summons power should be construed pursuant to U.S. law as the Convention contemplates in Article 27, Paragraph 4 ("the other Contracting State shall obtain the information to which the request relates in the same manner and to the same extent as if its own taxation were involved").

31. Even if this Court were to limit the IRS' actions as an agent to a foreign sovereign, as Plaintiffs suggest, this Court is of the opinion that the United States has complied with 26 U.S.C. section 6013 confidentiality provisions relating to "return information" sought by the IRS

for the French Government pursuant to 26 U.S.C. section 6103(b)(2)[5].

32. 26 U.S.C. section 7213 prohibits the disclosure of return information as defined in section 6103(b)(2). However, section 6103(k)(4) permits the disclosure of return information to "a competent authority of a foreign government which has an income tax . . . convention . . . with the United States but only to the extent provided in, and subject to the terms and conditions of such convention." Because this Court has concluded above that the Convention permits the IRS to obtain the bank records of the Chelalas pursuant to the procedures set forth in Title 26, section 6103(k)(4) clearly applies to the instant case and exempts the confidentiality limitations of section 6103.

33. Accordingly, this Court finds that Plaintiffs have not met their burden of showing that the issuance of the IRS Summons was for an improper purpose. As such, the IRS' investigative efforts should not be thwarted on these grounds.

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[5] Return information is defined as "a taxpayer's identity, the nature, source, or amount of his income payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (of the amount thereof), of any person under this title for any tax, penalty interest, fine, forfeiture, or other imposition, or offense . . . " 26 U.S.C. section 6103(b)(2)(A).

(c) Plaintiffs Have Failed to Show a Lack of Good Faith by the United States.

34. Plaintiffs seek to rebut the United States' prima facie showing by arguing that the United States failed to meet the Powell test mandating compliance with administrative procedures, evidencing a lack of good faith behind the issuance of the Summons. This Court finds that Plaintiffs cannot sustain this claim.

35. Plaintiffs argue that the notice requirements of Title 26 were not satisfied, mandating a finding that the Summons must be quashed. Specifically, Plaintiffs assert that they did not receive notice in the Congo, and thus the United States' notice was deficient. The United States argues that they did not become aware of Plaintiffs' Congo address until June 15, 1998, the date of appearance under the Summons.

36. Section 7609(a)(1) provides that notice of a third party summons shall be given to any person identified in the description of the records contained in the summons within 3 days of the day on which service is made, "but no later than the 23rd day before the day fixed in the summons as the day upon which such records are to be examined. Such notice shall be accompanied by a copy of the summons which has been served and shall contain an explanation of the right under subsection (b)(2) to bring a proceeding to quash the summons." Service of the summons must be either personally delivered or "mailed by certified or registered mail to the last known address of such person . . . entitled to notice" 26 U.S.C. section

7609(a)(2)[6] The purpose behind such notice is to allow the taxpayer the opportunity to invoke his right to intervene and seek to quash the summons. See Sylvester v. United States, 978 F.2d 25, 28 [71 AFTR 2d 93-321] (1st Cir. 1992). A sister circuit recently held that the district court may exercise discretion to excuse the technical notification requirements of section 7609(a) "if, and only if, the party (or parties) entitled to statutory notification was (or were) not substantially prejudiced by the violation – that is, if the error was harmless." Cook v. United States, 104 F3d 886, 889 [79 AFTR 2d 97-577] (6th Cir. 1997); Mack v. IRS, 76 AFTR.2d 95-5860 [76 AFTR 2d 95-5860] (E.D. Cal 1995) (equitable tolling of time limits in section 7609 permitted because no explicit congressional statement that limitations period is jurisdictional exists).

37. Here, Plaintiffs argue that the United States was on notice of the Congo address of the Chelalas, and thus were required to provide notice to that address under section 7609. Plaintiffs offer the Second Amended Declaration of Thomas Rossitto who states that a "conference call took place on March 19, 1998 between Joan Maack of

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[6] This Court notes that the parties vigorously dispute the Chelalas' home, tax home, residence and domicile. However, the true issue is the "last known address" of the Chelalas which is never directly addressed by either party.

Also, Plaintiffs argue that it is unfair for Title 26 to rest on the "mailing" of the Summons instead of the "receipt" by the taxpayer, and that such provisions should not be enforced against foreign taxpayers. Such decision is beyond the scope of this Court's findings today, and Plaintiffs offer no other court authority suggesting that such a finding has yet been made under these facts.

the Firm, the Agent, and myself where I clearly stated while engaged in the telephone conversation with the Agent that the Chelalas were residents of the Congo.[7]" See Second Declaration of Thomas J. Rossitto, paragraph 8. In addition, on October 15, 1997, Maack responded to a letter from Phelps, stating that "[t]he tax home of the Chelalas is the Congo, per the Chelalas.[8]" The United States insists that Plaintiffs, Rossitto or Maack never provided the Chelalas, exact Congo address prior to the United States' receipt of certain corporate taxpayer forms, Form 5472, provided by Rossitto to the IRS on June 15, 1998. See Decl. of Carroll. Exhibit 5.

38. Plaintiffs rely on United States v. Desert Palace, Inc., 43 AFTR.2d 79-1128 [43 AFTR 2d 79-1128] (D. Nev. 1979) to support their argument that informal notice is insufficient, and that statutory notice under section 7609

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[7] The United States objected to Rossitto's initial declaration as hearsay, however, the Second Declaration of Rossitto filed on December [illegible] adequately demonstrates Rossitto's personal knowledge as the 'principal in charge' of Lidas Corporation, which was served with a Notice of Examination by the IRS on May 6, 1997. Further the quoted language of the Second Declaration of Rossitto does not constitute admissable hearsay as Rossitto is merely testifying to his own statement.

[8] This Court overrules the United States evidentiary objection to the response letter attached as Exhibit 3 to Maack's declaration as inadmissable hearsay and lacking in foundation and authentication. In her Second Declaration, Maack states that, in her capacity as staff accountant of Rossitto & Associates, she responded to Phelps's inquires in the October 15, 1997 letter. This Court rules that Mack has the requisite personal knowledge to attest to the existence of the response letter because she wrote it, and the content of the letter speaks for itself.

was mandatory in this instance. However, this Court finds Desert Palace unpersuasive. The district court of Nevada did state that a taxpayer intervener was entitled to actual notice under section 7609(a)(1), despite informal notice; however, the court's reasoning was that the United States disputed the need for any notice to the taxpayer based upon its contention that the defendant was not a third-party record keeper under the statute. Plaintiffs offer no other binding authority on this Court to merit a decision to quash the Summons at issue because of any notice defects. See Mack, supra, (equitable tolling permitted where claimant has adequately pursued judicial remedies). As stated above, the underlying question before this Court today is whether the United States, through the IRS, issued the Summons in good faith. This Court has concluded that the United States has made this threshold showing, leaving Plaintiffs with a "heavy burden" to defeat this good faith presumption. Plaintiffs have failed to do so. In the instant case, the Chelalas were not substantially prejudiced by their lack of notification in the Congo. The Chelalas were not precluded from the timely filing their Complaint with this Court on June 3, 1998, prior to the date of appearance and production in the Summons of June 15, 1998. Further, the United States acted in good faith by attempting to serve the Chelalas in both Nice, France and Lebanon. Thus, any notion that the United States was frustrating the purpose of section 7609 by failing to safeguard the Chelalas' interests is nonexistent. The intent of the statute has been served, and quashing the Summons today solely on the grounds of this technical oversight would be futile.

39. Finally, in their Reply, Plaintiffs insert one final argument that because service was attempted abroad, the Hague Convention notice requirements, allegedly requiring proof of receipt and a translation of the summons, should govern. The Hague Convention does apply whenever the forum state's method of serving process "requir[es] the transmittal of documents abroad." V.W. v. Schlunk, 486 U.S. 695, 700 (1988). Nonetheless, the Hague Convention does not REQUIRE receipt of service of process nor translation as Plaintiffs suggest. Article 10(a) provides that the Convention is not meant to prohibit "the freedom to send judicial documents, by postal channels, directly to persons abroad.[9]" There is no indication in the Convention itself that the foreign party must *actually* receive the documents. See e.g., Quinn v. Keinicke, 700 A.2d 147 (Sup. Ct. Del. 1996) (documents mailed to a foreign defendant satisfy Article 10(a)'s requirement that documents be "sent"). Moreover, the only reference to translation of documents that is apparent to this Court lies in article 5. Under Article 5(b), if the contracting states elect to use a Central Authority of a state to serve a document, "the Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed." This is clearly not an absolute requirement, and Plaintiffs offer no evidence that such a Central Authority would even be necessary to comply with the service requirements in the instant case. Therefore, this

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[9] The receiving state may specifically object to this section's applicatiion, and France has not so objected.

Court finds that the United States' mailing of the Summons to the Chelalas in France and Lebanon complied with the Hague Convention. Accordingly, this Court finds that Plaintiffs have failed to show that the issuance of the IRS Summons was in bad faith.

Conclusion

40. The sole purpose behind summary enforcement proceedings is merely to "ensure that the IRS has issued the summons for a proper purpose and in good faith." Powell, 379 U.S. at 57-58. Therefore, in light of this Court's finding herein that the United States has demonstrated good faith sufficient for enforcement of the Summons, and because Plaintiffs have not overcome this showing of good faith by demonstrating that the Summons was issued for an improper purpose or in bad faith, this Court, in its discretion, finds that the enforcement of the Summons against the Chelalas is appropriate.

41. As such, this Court converts the United States' Motion to Dismiss Complaint to Quash Summons into a Motion for Summary Judgment pursuant to Rules 12(b) and 56, and grants Summary Judgment in favor of the United States to Summarily Enforce the IRS Summons.

42. The Order Enforcing the IRS Summons will be stayed pending resolution on appeal to the Ninth Circuit Court of Appeals.

43. Any finding of fact deemed more appropriately designated as a conclusion of law is incorporated here as a conclusion of law.

It Is So Ordered.

Dated: February 5, 1999 Dickran Tevrizian, Jr. United States District Judge.

U.S. Const., art. 1 Section 1. Legislative Power Vested in Congress

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

U.S. Const., art. 1 Section 7, Clause 1. Revenue Bills to Originate in House; Amendments by Senate

All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other Bills.

U.S. Const., art. 1 Section 7, Clause 2. Approval or Veto of Bills; Repassage Over Veto

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and

the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

U.S. Const., art. 1 Section 8, Clause 1. Powers of Congress; Levy of Texas for Common Defense and General Welfare; Uniformity of Taxation

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

U.S. Const., art. 2 Section 2, Clause 2. Treaty Making Power; Appointing Power

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments

are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

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12 U.S.C. § 3401. Definitions

For the purpose of this chapter, the term –

(1) "financial institution" means any office of a bank, savings bank, card issuer as defined in section 1602(n) of title 15, industrial loan company, trust company, savings association, building and loan, or homestead association (including cooperative banks), credit union, or consumer finance institution, located in any State or territory of the United States, the District of Columbia, Puerto Rico, Guam, American Samoa, or the Virgin Islands;

(2) "financial record" means an original of, a copy of, or information known to have been derived from, any record held by a financial institution pertaining to a customer's relationship with the financial institution;

(3) "Government authority" means any agency or department of the United States, or any officer, employee, or agent thereof;

(4) "person" means an individual or a partnership of five or fewer individuals;

(5) "customer" means any person or authorized representative of that person who utilized or is utilizing any service of a financial institution, or for whom a financial institution is acting or has acted as a

fiduciary, in relation to an account maintained in the person's name;

(6) "holding company" means –

(A) any bank holding company (as defined in section 1841 of this title);

(B) any company described in section 1842(f)(1) of this title; and

(C) any savings and loan holding company (as defined in the Home Owners' Loan Act [12 U.S.C. 1461 et seq.]);

(7) "supervisory agency" means with respect to any particular financial institution, holding company, or any subsidiary of a financial institution or holding company, any of the following which has statutory authority to examine the financial condition, business operations, or records or transactions of that institution, holding company, or subsidiary –

(A) the Federal Deposit Insurance Corporation;

(B) Director, Office of Thrift Supervision;

(C) the National Credit Union Administration;

(D) the Board of Governors of the Federal Reserve System;

(E) the Comptroller of the Currency;

(F) the Securities and Exchange Commission;

(G) the Secretary of the Treasury, with respect to the Bank Secrecy Act (Public Law 91-508, title I) [12 U.S.C. 1951 et seq.] and subchapter II of chapter 53 of title 31; or

(H) any State banking or securities department or agency; and

(8) "law enforcement inquiry" means a lawful investigation or official proceeding inquiring into a violation of, or failure to comply with, any criminal or civil statute or any regulation, rule, or order issued pursuant thereto.

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12 U.S.C. § 3402. Access to financial records by Government authorities prohibited; exceptions

Except as provided by section 3403(c) or (d), 3413, or 3414 of this title, no Government authority may have access to or obtain copies of, or the information contained in the financial records of any customer from a financial institution unless the financial records are reasonably described and –

(1) such customer has authorized such disclosure in accordance with section 3404 of this title;

(2) such financial records are disclosed in response to an administrative subpena [sic] or summons which meets the requirements of section 3405 of this title;

(3) such financial records are disclosed in response to a search warrant which meets the requirements of section 3406 of this title;

(4) such financial records are disclosed in response to a judicial subpena [sic] which meets the requirements of section 3407 of this title; or

(5) such financial records are disclosed in response to a formal written request which meets the requirements of section 3408 of this title.

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12 U.S.C. § 3413. Exceptions

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(c) Disclosure pursuant to title 26

Nothing in this chapter prohibits the disclosure of financial records in accordance with procedures authorized by title 26.

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26 U.S.C. § 6103. Confidentiality and disclosure of returns and return information

(a) General rule. – Returns and return information shall be confidential, and except as authorized by this title –

(1) no officer or employee of the United States,

(2) no officer or employee of any State, any local child support enforcement agency, or any local agency administering a program listed in subsection (*l*)(7)(D) who has or had access to returns or return information under this section, and

(3) no other person (or officer or employee thereof) who has or had access to returns or return

information under subsection (e)(1)(D)(iii), paragraph (6), (12), or (16) of subsection (*l*), paragraph (2) or (4)(B) of subsection (m), or subsection (n),

shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section. For purposes of this subsection, the term "officer or employee" includes a former officer or employee.

(b) **Definitions.** – For purposes of this section –

(1) **Return.** – The term "return" means any tax or information return, declaration of estimated tax, or claim for refund required by, or provided for or permitted under, the provisions of this title which is filed with the Secretary by, on behalf of, or with respect to any person, and any amendment or supplement thereto, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return so filed.

(2) **Return information.** – The term "return information" means –

(A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for

any tax, penalty, interest, fine, forfeiture, or other imposition, or offense,

(B) any part of any written determination or any background file document relating to such written determination (as such terms are defined in section 6110(b)) which is not open to public inspection under section 6110, and,

(C) any advance pricing agreement entered into by a taxpayer and the Secretary and any background information related to such agreement or any application for an advance pricing agreement,

but such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer. Nothing in the preceding sentence, or in any other provision of law, shall be construed to require the disclosure of standards used or to be used for the selection of returns for examination, or data used or to be used for determining such standards, if the Secretary determines that such disclosure will seriously impair assessment, collection, or enforcement under the internal revenue laws.

* * *

(k) **Disclosure of certain returns and return information for tax administration purposes.** –

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(4) **Disclosure to competent authority under tax convention.** – A return or return information may be disclosed to a competent authority of a foreign government which has an income tax or gift and estate tax convention, or other convention or bilateral

agreement relating to the exchange of tax information, with the United States but only to the extent provided in, and subject to the terms and conditions of, such convention or bilateral agreement.

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26 U.S.C. § 7602. Examination of books and witnesses

(a) **Authority to summon, etc.** – For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized –

* * *

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

* * *

Convention Between the Government of the United States of America and the Government of the French Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital

(ENTERED INTO FORCE DECEMBER 30, 1995)

The Government of the United States of America and the Government of the French Republic, desiring to conclude a new convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital, have agreed as follows:

* * *

ARTICLE 2

Taxes Covered

1. The taxes which are the subject of this Convention are:

(a) in the case of the United States:

(i) the Federal income taxes imposed by the Internal Revenue Code (but excluding social security taxes); and

(ii) the excise taxes imposed on insurance premiums paid to foreign insurers and with respect to private foundations

(hereinafter referred to as "United States tax"). The Convention, however, shall apply to the excise taxes imposed on insurance premiums paid to foreign insurers only to the extent that the risks covered by such premiums are not reinsured with a person not entitled to exemption from such taxes under this or any other income tax convention which applies to these taxes;

(b) in the case of France, all taxes imposed on behalf of the State, irrespective of the manner in which they are levied, on total income, on total capital, or on elements of income or of capital, including taxes on gains from the alienation of movable or immovable property, as well as taxes on capital appreciation, in particular:

(i) the income tax (l'imp"t sur le revenu);

(ii) the company tax (l'imp"t sur les soci,t,s);

(iii) the tax on salaries (la taxe sur les salaires) governed by the provisions of the Convention applicable, as the case may be, to business profits or to income from independent personal services; and

(iv) the wealth tax (l'imp"t de solidarit, sur la fortune)

(hereinafter referred to as "French tax")

2. The Convention shall apply also to any identical or substantially similar taxes that are imposed after the date of signature of the Convention in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other of any significant changes which have been made in their respective taxation laws and of any official published material concerning the application of the Convention, including explanations, regulations, rulings, or judicial decisions.

* * *

ARTICLE 27

Exchange of Information

1. The competent authorities of the Contracting States shall exchange such information as is pertinent for carrying out the provisions of this Convention and of the domestic laws of the Contracting States concerning taxes covered by this Convention insofar as the taxation thereunder is not contrary to this Convention. The exchange of information is not restricted by Article 1 (Personal Scope). Any information received by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) involved in the assessment, collection, or administration of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by this Convention. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.

2. In no case shall the provisions of paragraph 1 be construed so as to impose on a Contracting State the obligation:

(a) to carry out administrative measures at variance with the laws or the administrative practice of that or of the other Contracting State;

(b) to supply particulars that are not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;

(c) to supply information that would disclose any trade, business, industrial, commercial, or professional secret or trade process, or information, the disclosure of which would be contrary to public policy (order public).

3. The exchange of information shall be on request with reference to particular cases, or spontaneous, or on a routine basis. The competent authorities of the Contracting States shall agree on the list of information which shall be furnished on a routine basis.

4. (a) If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall obtain the information to which the request relates in the same manner and to the same extent as if its own taxation were involved, notwithstanding the fact that the other State may not, at that time, need such information for purposes of its own tax.

(b) If specifically requested by the competent authority of a Contracting State, the competent authority of the other Contracting State shall, if possible, provide information under this Article in the form of depositions of witnesses and authenticated copies of unedited original documents (including books, papers, statements, records, accounts, and writings), to the same extent such depositions and documents can be obtained under the laws and administrative practices of that other State with respect to its own taxes.

(c) A Contracting State shall allow representatives of the other contracting State to enter the first-mentioned State to interview taxpayers and look at and copy their books and records, but

only after obtaining the consent of those taxpayers and the competent authority of the first-mentioned State (who may be present or represented, if desired), and only if the two Contracting States agree, in an exchange of diplomatic notes, to allow such inquiries on a reciprocal basis. Such inquiries shall not be considered audits for purposes of French domestic law.

5. Notwithstanding the provisions of Article 2 (Taxes Covered), all taxes imposed on behalf of a Contracting State shall be considered as taxes covered by the convention for purposes of this Article.

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